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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 INVESTMENT FUND, INC.),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED RESTATED

Petitioner argues that Section 16(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78p(b), cannot be constitutionally applied to a tiny subset of Section 16(b) cases based on the false premise that "short-swing" insider trading is a victimless offense. Congress rejected that premise when it made a considered finding, supported by ample evidence, that "short-swing" insider trading in an issuer's equity securities injures both the issuer and its other securityholders. The Second Circuit echoed Congress's conclusion when it correctly found that Petitioner's short-swing insider trading caused actual and imminent, concrete and particularized injuries that are cognizable under Article III. The questions presented are as follows:

1. Does "short-swing" insider trading by a more-than-10% stockholder under Section 16(b) of the Securities Exchange Act of 1934 cause an Article III injury in fact to issuers and their investors where the statutory insider asserts without record evidence that it lacked access to inside information?

2. May Congress extend fiduciary obligations to a class of stockholders even if the common law did not universally recognize them as fiduciaries?

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STATEMENT OF THE CASE

I. Introduction

Section 16(b) is the original and only express insider trading provision in the federal securities laws. Its stated purpose is to "prevent[] the unfair use of information" that an insider may have "by reason of his relationship to the issuer." 15 U.S.C. § 78p(a).

Section 16 of the Act applies to the directors and officers of any issuer with a class of publicly traded equity securities. § 78p(a), (b). It also applies to each beneficial owner of more than 10% of the outstanding shares of any such class. *Id.* If any such officer, director, or beneficial owner realizes a profit from the purchase and sale, or sale and purchase, of any equity security of the issuer within a period of less than six months, Section 16(b) requires him to disgorge that profit to the issuer. § 78p(b). If the insider fails to return his "short-swing" profit to the issuer, Section 16(b) authorizes the issuer to bring suit against him to recover it. *See id.*

Congress passed Section 16(b) after extensive hearings established that short-swing trading by officers, directors, and large shareholders of publicly traded companies harmed the companies and their other securityholders, not just the public at large. Although its constitutionality has been challenged on several occasions since 1934, no federal court or judge has ever held Section 16(b) unconstitutional in any respect.

Petitioner Bulldog Investors General Partnership ("*Bulldog*" or "*Petitioner*") concedes that it violated Section 16(b) when it reaped short-swing profits as a more-than-10% statutory insider of an issuer's equity securities. Bulldog nonetheless claims that Section 16(b) cannot be constitutionally applied to it because its insider trading caused no Article III injury in fact. As explained below, Bulldog has not identified a conflict between the Second Circuit's decision and the opinion of any other court on the questions presented. That is unsurprising, since a unanimous Court already answered the same questions in *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Because Bulldog's petition reduces to a request for error correction where no error is apparent, the petition should be denied.

II. Statutory Background

Prior to June of 1934, "speculation by insiders – directors, officers, and principal stockholders – in the securities of their corporation was a widely condemned evil." *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943). In the pre-Section 16 era, "'profits from "sure thing" speculation in the stocks of their corporations were more or less generally accepted by the financial community as part of the emolument for serving as a corporate officer or director notwithstanding the flagrantly inequitable character of such trading.'" *Blau v. Lamb*, 363 F.2d 507, 514 (2d Cir. 1966) (quoting 10 S.E.C. Ann. Rep. 50 (1944)).

When these "stock market abuses were publicized, there was a country-wide call for reform. . . ." Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act* (*"Cook & Feldman"*), 66 HARV. L. REV. 385, 385-86 (1953) (cataloging abuses). From April to June 1934, Congress held extensive hearings and debates to understand the problem and craft a legislative solution. *See* Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209, 352-57 (1987) (in-depth discussion of Section 16(b)'s legislative history).

Based on "a considered finding, supported by ample evidence, of the abuses of inside speculation," *Smolowe*, 136 F.2d at 239, Congress determined that the "only method [it] deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972); *see also* Hearings Before Senate Comm. on Banking & Currency, 73d Cong., 2d Sess. 6557 (1934) (discussing views of experts recommending this approach). The reporting requirements of Section 16(a) and the "flat rule" strict-liability provision of Section 16(b) are significant parts of that solution. *See Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973) (describing the operation of the liability portion of the statute).

The purpose of Section 16(b) is stated in its text. "As specified in its introductory clause, § 16(b) was enacted '[f]or the purpose of preventing the unfair use of information which may have been obtained by [a statutory insider] . . . by reason of his relationship to the issuer.' Congress recognized that shortswing speculation by stockholders with advance, insider information would threaten the goal of the Securities Exchange Act to 'insure the maintenance of fair and honest markets.'" *Id.* at 591 (quoting 15 U.S.C. § 78p(b)); *see also Blau v. Max Factor & Co.*, 342 F.2d 304, 308 (9th Cir. 1965) (summarizing Congress's rationale for passing Section 16(b)).

Rather than charge the SEC with enforcing Section 16(b), Congress left that task exclusively to private parties. *Gollust*, 501 U.S. at 122. The Act provides that suit to recover short-swing profits may be instituted "by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." 15 U.S.C. § 78p(b).

In passing a law, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment). Congress did exactly this when it passed Section 16(b). It identified short-swing trading as conduct that injures issuers and their securityholders, it adopted a statute to vindicate that injury, and it left enforcement of the statute to those most injured by the conduct. Section 16(b) is a well-crafted legislative response to a widely recognized problem.

III. Factual and Procedural Background

On January 30, 2010, Respondent Deborah Donoghue sent a letter to Morgan Stanley High Yield Fund, Inc., now known as Invesco High Yield Investment Fund, Inc. ("Invesco") stating that Bulldog and its principal Phillip Goldstein had reaped short-swing profits under Section 16(b) of the Act. *See* App. 35a. Donoghue explained in her letter that Bulldog and Goldstein were "insiders" of Invesco under Section 16 the Act because they owned more than 10% of a class of Invesco's stock; that they bought and sold shares of Invesco's securities within less than six months; and that certain of those sales occurred at prices higher than certain of those purchases. *See* App. 28a. Donoghue advised that if Invesco did not take action against Bulldog and Goldstein within 60 days, Donoghue was authorized under the Act to pursue recovery on her own. *See id.*; 15 U.S.C. § 78p(b).

Invesco chose not to bring an action against Bulldog, deferring to Donoghue for economic reasons. Donoghue filed a complaint in the Southern District of New York on April 13, 2011. *See* App. 33a. Brought in her capacity as a securityholder of Invesco, Donoghue's complaint sought recovery of short-swing profits from both Bulldog and Goldstein. App. 36a-40a. Invesco was named as a nominal Defendant to ensure that its interests were properly before the Court. App. 35a.

Bulldog moved to dismiss Donoghue's complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). App. 29a. Conceding statutory standing, Bulldog argued that Donoghue and Invesco lacked standing under Article III because Invesco did not suffer an "injury in fact" sufficient to justify constitutional standing. *See id.*

The District Court denied Bulldog's motion. App. 31a-32a. It found a constitutionally cognizable injury in fact because Bulldog invaded Donoghue's and Invesco's "legally protected interest[s]" as that term is defined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). *See* App. 29a. The Court further observed that *Gollust v. Mendell*, 501 U.S. 115 (1991), found "'no serious constitutional question' under Article III as to a shareholder's standing to bring suit under § 16(b)." App. 31a (quoting *Gollust*, 501 U.S. at 126).

The parties agreed to settle following the District Court's opinion. The settlement provided for Bulldog to pay the Issuer $85,491, which amount represented 100% of the short-swing profits realized by Bulldog. *See* App. 22a. Because that recovery also satisfied Goldstein's liability to the Issuer, the settlement provided further for Goldstein's dismissal from the action with prejudice. App. 22a. The District Court approved the settlement and issued a final judgment on March 30, 2011. App. 26a. Bulldog's obligations under the parties' agreement were conditioned on its right to appeal the District Court's order denying its motion to dismiss for lack of subject matter jurisdiction. *See* App. 5a. Bulldog timely appealed.

The Second Circuit unanimously affirmed. *See* App. 1a-19a. The Court recited the elements of Article III standing and noted that "the injury-in-fact requirement is a 'hard floor of Article III jurisdiction that cannot be removed by statute.'" App. 8a (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)). It held that Section 16(b)'s "flat rule effectively makes 10% 'beneficial owners fiduciaries' . . . at least to the extent of making *all* short-swing transactions by such persons in the issuer's stock 'breaches of trust.'" App. 12a (quoting *Gratz v. Claughton*, 187 F.2d 46, 49 (2d Cir. 1951) (L. Hand, J.)). That duty "conferred upon Invesco an enforceable legal right to expect Bulldog to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing." *Id.* (citation omitted).

The Second Circuit elaborated on the interests Bulldog had harmed through its short-swing trading. The Court stated that "[a] corporate issuer, after all, has an interest in maintaining the continued public acceptance and marketability of its stock. This interest is injured not only by actual insider trading but by *any* trading in violation of an insider's fiduciary duty, including the trading altogether prohibited by § 16(b)." App. 14a (citation and internal quotation marks omitted). The Court explained that when

Congress passed Section 16(b), it "created legal rights that *clarified* the injury that would support standing." App. 18a (emphasis added). As Congress's detailed 1934 findings show, the injuries caused by short-swing insider trading were well-known and existed before the statute was passed. Those injuries support Article III standing under this Court's precedents.

SUMMARY OF ARGUMENT

The petition should be denied because it does not implicate a circuit split. No federal court or judge has ruled Section 16(b) unconstitutional in any respect over the past 80 years, nor has any court ever held that a Section 16(b) plaintiff or issuer lacked Article III standing. Indeed, this Court unanimously ruled in *Gollust v. Mendell*, 501 U.S. 115 (1991), that a Section 16(b) plaintiff had Article III standing under circumstances more attenuated than those at issue here.

Petitioner instead cites a "split" involving cases that have nothing to do with securities law, let alone Section 16(b). But each of those cases – like the decision below – recites the well-established rule that a plaintiff must allege a statutory violation *and* a concrete and particularized Article III injury in fact. The standing inquiry in every case Petitioner cites ultimately turns on a fact-bound analysis of the particular conduct alleged, as applied to each statute. A Section 16(b) case is not a proper vehicle to address standing under the RESPA, FHA, FDCPA, UCSPA, ERISA, ADA, IACA, or any of the other statutes mentioned in the petition.

In any event, the decision below was correct. The key premise of Petitioner's argument is that the Second Circuit found standing even though Invesco and Donoghue suffered no injury of any kind. This is a misstatement of the record and the decision below. As the Second Circuit explained, short-swing insider trading injures issuers and their securityholders by creating the appearance (and often the reality) that insiders with superior access to information are unfairly profiting from their insider status, which in turn destroys investor confidence that the market for the issuer's stock is fair and honest. These harms are independent of the statutory violation: as Congress found, they existed long before Section 16(b) was passed.

This case is also a poor candidate for certiorari because it presents multiple vehicle problems. For example, the sparse record in this case does not support Bulldog's assertion that it was an "outsider" without access to inside information when it made the trades in question. Because this is a poor vehicle to review a splitless issue where the decision below was correct, certiorari should be denied.

ARGUMENT

I. THIS PETITION DOES NOT IMPLICATE A CIRCUIT SPLIT OF ANY KIND

A. No Section 16(b) Case Conflicts With the Decision Below

The decision below held that Donoghue and Invesco had Article III standing to prosecute a Section 16(b) action against Bulldog for disgorgement of short-swing insider trading profits. App. 19a. No Section 16(b) case comes close to conflicting with this ruling. Petitioner effectively concedes this by citing only three Section 16(b) cases in its brief and failing to allege that the decision below conflicts with any of them.

There is no circuit split concerning Section 16(b) because the issue in this case was resolved by the unanimous Supreme Court in *Gollust v. Mendell*, 501 U.S. 115, 118 (1991). The question presented in *Gollust* was whether a shareholder "who properly instituted a § 16(b) action as the owner of a security of the issuer, may continue to prosecute the action after his interest in the issuer is exchanged in a merger for stock in the issuer's new corporate parent." *Gollust v. Mendell*, 501 U.S. 115, 118 (1991) (internal quotation marks and brackets omitted). This Court held that the shareholder had both statutory and Article III standing. *Id.* at 127-28. After reciting the elements of constitutional standing, the Court held that the shareholder had a personal stake in the litigation in the form of a "continuing financial interest in the outcome of the litigation" that satisfies Article III. *Id.* at 126.

This Court's constitutional standing analysis in *Gollust* applies equally to Donoghue and the shareholder in *Gollust*. Both brought Section 16(b) actions against statutory insiders that owned more than 10% of the respective issuers' stock, and both faced challenges to their standing. The only difference between the two is that Donoghue has remained a shareholder of Invesco throughout this litigation, whereas the *Gollust* shareholder involuntarily lost his shares after a merger. In other words, both plaintiffs were similarly situated, except Mendell's case for constitutional standing was more attenuated that Donoghue's. It follows from *Gollust* that Donoghue (and therefore Invesco, on whose behalf Donoghue sued) has Article III standing here.

Because there is no circuit split over Article III standing for Section 16(b) plaintiffs and issuers, and because this Court has already unanimously found standing for a Section 16(b) plaintiff with a tougher jurisdictional case than Donoghue's, there is no reason to grant certiorari. At a minimum, the Court should wait until at least one federal judge endorses a Section 16(b) standing challenge before addressing this splitless issue.

B. No Other Case Conflicts With the Decision Below

Effectively conceding that no Section 16(b) case is even in tension with the decision below, Petitioner looks elsewhere to manufacture a circuit split. Petitioner claims that the Second Circuit's decision "echoes a persistent conflict" in the federal courts over whether a "statutory violation is alone sufficient to give the plaintiff Article III standing . . . where the plaintiff has not alleged any injury resulted from the violation." Petn. at 11. A closer look reveals that no such split exists because cases on both sides of the putative split (like the decision below), recite and apply the same well-established constitutional principles. Even assuming there is a split, this petition would not allow the Court to resolve it.

Petitioner identifies three cases involving The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(a), (b) ("RESPA"),[1] allegedly holding that a violation of a statute *alone*, absent any underlying injury of any kind, constitutes an Article III injury in fact. *See* Petn. at 12 (citing *Edwards v. First*

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[1] The RESPA prohibits the payment of "any fee, kickback, or thing of value" in exchange for business referrals and requires that all charges made or received for rendering a real estate settlement service be devoted to services for the customer. 12 U.S.C. § 2607(a), (b). In the event of a violation, defendants are liable to the "person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

Am. Corp., 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S.Ct. 3022 (2011), *dismissed as improvidently granted*, 132 S.Ct. 2536 (2012); *Carter v. Walles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009)). Petitioner claims that these cases conflict with seven "non-RESPA" decisions from the Second, Third, and Tenth Circuits, which require both a statutory violation and an Article III injury. *See* Petn. at 12-13.

This 3-7 split is illusory because Petitioner misrepresents what the three RESPA cases actually say. Far from holding that no injury in fact is necessary, at least two of the RESPA cases say just the opposite. In *Carter*, the Court stated that the power of Congress to create statutory rights is "not unlimited" because Article III requires a plaintiff to suffer an actual injury in fact apart from a mere statutory violation. 553 F.3d at 988. In *Alston*, the Court explained that the plaintiff must have suffered a "concrete and particularized" injury in fact that "affects the plaintiff in a personal and individual way," and it plainly attempted to pinpoint an Article III harm, not merely a statutory violation. *See* 585 F.3d at 763.

Carter and *Alston* never hold, as Petitioner claims, that a statutory violation confers Article III standing where the plaintiff "has not suffered an actual injury." *See, e.g.*, Petn. at 4, 11-12. Both cases require an actual and imminent, concrete and particularized injury in fact, not just a statutory violation. *See Carter*, 553 F.3d at 988; *Alston*, 585 F.3d at 763. They then hold that the violation of a right to a kickback-free referral is such an injury, even if it is not monetary in nature. *Carter*, 553 F.3d at 989; *Alston*, 585 F.3d at 763.[2]

Because the RESPA cases require both an Article III injury in fact and a statutory violation, the seven cases allegedly on the other side of Petitioner's 3-7 split do not conflict. All of Petitioner's cases articulate identical jurisdictional principles and then apply those principles to a grab-bag of unrelated statutes. As the decision below pointed out, any differences in

[2] The Ninth Circuit's analysis in *Edwards v. First American Corporation* is undeniably more cursory. *See* 610 F.3d 514, 517 (9th Cir. 2010), *cert. granted*, 131 S.Ct. 3022 (2011), *dismissed as improvidently granted*, 132 S.Ct. 2536 (2012). *Id.* at 517. But even *Edwards* arguably found a cognizable injury in fact in addition to a statutory violation when it cited *Carter* and *Alston* and independently reviewed the Congressional findings made when RESPA was enacted. *Id.* at 517-18. At worst, *Edwards* is the sole outlier in the split, and the Second Circuit clearly distanced itself from the opinion in the decision below. *See* App. 16a-18a. Even if *Edwards* incorrectly stated or applied the law, this petition is not a proper vehicle to revisit *Edwards* for at least two reasons. First, as discussed in Section II below, the Second Circuit correctly found *both* a statutory violation *and* separate Article III injuries in fact. *See* App. 12a-13a, 14a, 18a. Because both are present in this case, the petition would not give the Court a chance to address whether a statutory violation by itself can confer Article III standing. Second, the historical, common-law, and policy arguments about kickback-related injuries in the RESPA cases have no bearing on whether a Section 16(b) securityholder or issuer is injured by insider trading. By the same token, an analysis of the injuries caused by short-swing insider trading will shed no light on whether a kickback-tainted title insurance referral harms its recipient in the absence of other harms.

outcomes among these cases depend on the specific laws and allegations at issue in each case, not the constitutional law they apply. *See* App. 16a (distinguishing cases involving other statutes as involving different rights and injuries).

For example, in *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112, 118 (2d Cir. 2009), the Second Circuit addressed standing under the ERISA statute as follows: "A plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must identify a statutory endorsement of the action and assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty." This is the same law articulated in *Carter*, *Alston*, and the decision below. The court came to a different conclusion in *Kendall*, but its holding was based on the specific factual allegations in the complaint and a careful examination of "the rights ERISA confers on plan participants." 561 F.3d at 120.

Like *Kendall*, *Carter*, *Alston*, and the decision below, Petitioner's Third Circuit cases also hold that even if a plaintiff shows a statutory violation, it must also show an Article III injury in fact. *See, e.g.*, *Fair Hous. Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d Cir. 1998); *Joint Stock Soc'y v. UDVN Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001). Each case merely applies these rules differently based on the allegations and statutes involved in each case. *See, e.g.*, *Main Line Times*, 141 F.3d at 443 (reviewing record after a jury verdict and holding that even assuming an injury in fact, the alleged injury did not cause the harm alleged under the Fair Housing Act).[3]

Nothing in Petitioner's Tenth Circuit decisions creates or exacerbates Petitioner's alleged split. In

[3] The rest of the Third Circuit cases Bulldog cites on page 14 of its petition also involve the application of well-established standing principles to the fact-bound records in each case. *See Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 74-78 (3d Cir. 1998) (stating black-letter rules for Article III standing and generalized grievance doctrine, and finding no injury in fact under the Fair Housing Act because plaintiff's allegations were not substantiated by the documents and other evidence before the court on summary judgment); *Joint Stock Soc'y v. UDVN Am., Inc.*, 266 F.3d 164, 174-76 (3d Cir. 2001) (noting that Article III requires only "an identifiable trifle of harm," but holding that plaintiffs lacked Article III and prudential standing to press statutory claims based on false advertising and false designation of origin because "plaintiffs have never marketed any vodka in the United States and have not adduced any evidence establishing that they are prepared at this time to sell any vodka in this country without using the Smirnov name" (citation omitted)); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) (noting that "[a]lthough Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone," and holding that an Americans With Disabilities Act plaintiff had standing because the preliminary injunction record showed that he suffered an injury from the statutory violation (citing *Lujan*, 504 U.S. at 578, for the proposition that Congress may "elevate to the status of a legally cognizable injury concrete, de facto injuries that were previously inadequate in law."). None of these cases state the law differently than the RESPA cases, and none of them apply the law differently than the Second Circuit did in the decision below.

Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996), the plaintiffs argued that certain landlords violated the Fair Housing Act, 42 U.S.C. §§ 3601-3631, by providing and advertising gender-segregated university housing. The Court found a statutory violation, but it held that the plaintiffs, who were not university students, did not suffer a *particularized* injury in fact when they merely read the discriminatory advertisements. 98 F.3d at 596. The Court called the plaintiffs "at most 'concerned bystanders,'" and noted that if they were granted standing, then almost anyone could bring a suit under the statute. *See id. Wilson* is a "generalized grievance" case about stigmatic discrimination. It neither conflicts with nor opines on the RESPA cases or the decision below in any way.[4]

In sum, all of Petitioner's cases agree with the decision below that in addition to proving a statutory violation, a plaintiff must demonstrate an Article III

[4] Petitioner's other Tenth Circuit case, *Heard v. Bonneville Billing and Collections*, 2000 U.S. App. LEXIS 14625 (10th Cir.) (unpublished), addresses the standing of a plaintiff to challenge allegedly unethical fee-splitting under the Fair Debt Collection Practices Act and the Utah Consumer Sales Practices Act. The Court's non-precedential order merely holds that because the plaintiff already paid attorneys' fees in full and did not allege that "the attorneys' fees were too high or unconscionable or that the attorney did not do any work to justify the statutory award," she had no "personal stake" in how the fees were divided. *Id.* at *14. Even if the case had precedential value, it is irrelevant because it addresses a pleading deficiency in a lawsuit involving two unrelated statutes.

injury in fact. To the extent the results in the cases differ, they are the result of either fact-bound analyses of each factual record or statute-specific analyses of the harms each law was passed to prevent.[5]

II. AS CONGRESS FOUND IN 1934 AND THE SECOND CIRCUIT HELD IN THE DECISION BELOW, SHORT-SWING INSIDER TRADING CAUSES JUDICIALLY COGNIZABLE INJURIES IN FACT APART FROM A MERE STATUTORY VIOLATION

Bulldog's Petition is based on the premise that the decision below found standing even though Invesco and Donoghue suffered no injury in fact. *See, e.g.*, Petn. at i (first Question Presented); 2 ("complaint alleged no fact that, if true, would constitute

[5] Petitioner's lengthy string cite of district court decisions adds nothing. *See* Petn. at 15-17. Alleged district court conflicts do not meet this Court's requirements for granting certiorari. *See* Supreme Court Rule 10(a) (requiring conflicts among "United States court[s] of appeals"). In any event, the district court cases cited are distinguishable for the same reasons as the appellate decisions. To take just one example, there is no arguable conflict between the decision below and any case involving the Indian Arts and Crafts Enforcement Act. Those cases, including *Native American Arts, Inc. v. Specialty Merchandise Corp.*, 451 F. Supp. 2d 1080, 1081-83 (C.D. Cal. 2006), articulate well accepted, standing principles, and then apply those principles to the relevant law (which has nothing to do with Section 16(b)) and the fact-bound record before each court. *See Native Am. Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 386, 391 (D.R.I. 2010) (describing plaintiff's shortcoming in *Specialty Merchandise Corp.* as a pleading error).

an actual injury to Invesco"); 11 (plaintiff has "not alleged any injury"); 18 (claiming the "absence of any pleaded actual injury"); 23 (claiming only an "injury '*de jure*'"). That premise is incorrect. It disregards Congress's carefully considered findings that short-swing insider trading causes concrete harms to both issuers and investors; it ignores the Second Circuit's analysis of these harms; and it is based on an improperly narrow view of the types of injuries that are cognizable under Article III.

Both before and after *Lujan*, Congress has had the power to identify particular harms that would otherwise be "inadequate in law," and "elevat[e]" those harms "to the status of legally cognizable injuries" for the purposes of Article III. *See Lujan*, 504 U.S. at 578. That is precisely what Congress did when it enacted Section 16(b). Before passing Section 16(b), Congress had before it "overwhelming evidence of widespread abuses" caused by short-swing insider trading. *Blau v. Oppenheim*, 250 F. Supp. 881, 884 (S.D.N.Y. 1966); *see* John E. Tracey & Alfred Brunson MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1056 (1934) ("testimony before the Senate Committee" provided many examples of insiders "disgracefully faithless to their stewardship" (citing testimony)). The Senate report describes these abuses vividly:

> Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who

> used their positions of trust and the confidential information which came to them in such positions, to aid them in market activities. Closely allied to this type of abuse was the unscrupulous employment of insider information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.

Senate Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934), quoted in *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592 n.23 (1973); *Smolowe*, 136 F.2d at 235 (describing abuses); *Adler v. Klawans*, 267 F.2d 840 (2d Cir. 1959).

Congress's 1934 hearings revealed that short-swing insider trading harms issuers and their securityholders by destroying confidence that markets are fair and honest. This appearance (and often reality) of unfairness deters investors from participating in markets, which in turn harms issuers and their securityholders by deflating the issuer's stock price and discouraging investors from participating in the market.

Although the injuries caused by these widespread insider-trading abuses were real, they were not uniformly prohibited by the existing patchwork of mostly state laws. *See* Cook & Feldman, *supra*, at 408-10 (describing scope and efficacy of state laws addressing insider trading prior to passage of the Act). But Congress rightly considered them actual injuries to issuers and their securityholders nonetheless, and it acted within its authority to eradicate them by "cast[ing] the standing net broadly – beyond the common-law interests. . . ." *Federal Election Commission v. Akins*, 524 U.S. 11, 19-20 (1998).

The Second Circuit echoed Congress's findings in the decision below. It stated that short-swing insider trading harms an issuer's "interest in maintaining a reputation for integrity, an image of probity for its § 16(b) insiders and in insuring the continued public acceptance and marketability of its stock." App. 14a (citation and internal quotation marks omitted). This sort of unfair dealing or "breach[ ] of trust" is exactly the type of evil Congress sought to remedy. *See* App. 12a (internal quotation marks and citation omitted); *see also Gratz v. Claughton*, 187 F.2d 46, 49-50 (2d Cir. 1951) (L. Hand, J.) (rejecting constitutional challenge to Section 16(b) by a more-than-10% shareholder pressing arguments very similar to Petitioner's). As the Second Circuit explained, Congress did not invent injuries in fact out of whole cloth. It merely "created legal rights that *clarified* the injury that would support standing." App. 18a (emphasis added).

Bulldog ignores the harms identified by Congress and the Second Circuit. In its cramped view of Article III injury in fact, issuers and their securityholders are not injured unless they are a "counterparty to any of Bulldog's purchases or sales" or if "Bulldog misappropriated any property or opportunity" from them.

See Petn. at 18, 19. Bulldog's blinkered conception of injury in fact has no basis in this Court's precedents,[6] and it cannot overcome Congress's well-considered findings. It is of no moment that the harms caused by insider trading fall short of outright theft.

Because the Second Circuit correctly found an Article III injury in fact apart from a mere statutory violation, the decision below is correct, and there is no reason to grant certiorari – even assuming that error-correction is a proper use of the Court's resources.

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[6] The injuries redressed by § 16(b) fit comfortably among other judicially recognized non-monetary Article III injuries in fact. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (loss of enjoyment of environmental areas constitutes Article III injury in fact); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) (denial of right of access to political disclosures); *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997) (reduction in quantity of available irrigation water constitutes Article III injury in fact); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982) (denial of right of "testers" to truthful information under the Fair Housing Act, even though the testers were not misled and did not want housing); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208 (1972) (loss of "social benefits of living in an integrated community," as well as stigmatization, count as Article III injuries in fact); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (emotional or psychological harms may count as injuries in fact); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 5-6 (1968) (statutorily created "competitive injury" permits businesses the right to sue to exclude potential competitors from the market).

III. EVEN IF THE QUESTIONS PRESENTED MERITED THIS COURT'S ATTENTION, THIS CASE IS A POOR VEHICLE FOR DECIDING THEM

A. This Case Will Address Section 16(b) Standing for a Vanishingly Small Class of Cases

From Bulldog's broad statement of the questions presented, Petn. at i, one might construe the petition as a broadside against Section 16(b) litigation by any issuer or securityholder. Buried at the end of Bulldog's brief is the truth: "[T]his case [lies] at the outer boundary of § 16(b). . . ." *Id.* at 20. Bulldog has petitioned for certiorari in a case "unlike § 16(b) cases involving officers and directors" and indeed "unlike many § 16(b) cases involving 10% holders who do have access to inside information." *Id.* Bulldog claims it is not challenging plaintiff standing against all Section 16(b) defendants but only against a defendant characterized as the "classic *outsider*." *Id.*

That challenge does not merit this Court's attention because it implicates virtually no Section 16(b) litigation. In 1991, the SEC adopted a rule allowing most "outsiders" to exclude shareholdings from their 10% ownership calculation. Rule 16a-1(a)(1), 17 C.F.R. § 240.16a-1(a)(1). The exclusion is available to broker dealers, banks, insurance companies, investment companies, registered investment advisers, employee benefit plans, parent holding companies or control persons, church plans, and Section 13(d) shareholder "group[s]." *Id.* It extends to all shares "acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b)." *Id.*

The SEC explained during the rulemaking process that this exclusion would avail just the sort of large shareholder that Bulldog characterizes as a "classic outsider." The SEC reasoned that Section 16 did not need to reach such shareholders because "[t]he ordinary course of business and passive investment intent conditions should minimize the potential for the institutions to use the aggregated holdings to exert control and gain access to inside information." Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Exchange Act Release No. 34-27148, 1989 SEC LEXIS 1641, at *19 (Aug. 18, 1989). Because the "classic outsider" already enjoys a de facto exemption from Section 16(b) liability under this rule, the standing question as applied to such defendants is trivial.

If the Court is interested in revisiting the limits set on Section 16(b) standing by *Gollust v. Mendel*, it should await a case in which those limits are at issue. For example, a case involving an officer or director could conceivably serve as a proper vehicle for considering whether the breach of fiduciary duty serves as a suitable "injury in fact" for Article III standing. By Bulldog's own admission, this case is not that vehicle. *See* Petn. at 20-22 (arguing that Bulldog owed no fiduciary duty to Invesco). As for the narrower question raised by Bulldog's petition (whether a "classic outsider" is capable of causing Article III injury to an issuer or its securityholders), the Court need not trouble itself. The exclusion in Rule 16a-1(a)(1) ensures that question almost never arises.

B. The Record Does Not Show That Petitioner Is a "Classic Outsider"

Petitioner makes much of the fact that it "was the consummate 'outsider,' with an arm's length adversarial relationship with Invesco's management." Petn. at 1; *see also, e.g.*, *id.* at 9, 20. But the record in this case says no such thing. This case was decided at the pleading stage, before discovery even opened. The only facts properly in the record are found in the complaint, and the complaint says nothing about Bulldog's supposed "outsider" status.

To the contrary, the complaint alleges that while Bulldog owned nearly 15% of Invesco's outstanding shares, App. 36a-37a, it turned a profit by buying and selling Invesco's stock within six months. *See* App. 38a-39a. Further, the complaint makes clear that Bulldog owned its shares with the "purpose or effect of changing or influencing control" of Invesco, and that one of Bulldog's general partners "attempted on several occasions to meet with the management of [Invesco] to instruct it as to their demands . . . ," which included proposed "actions intended to afford all shareholders an opportunity to realize net asset value for their shares." App. 37a.

Viewed in the light most favorable to Donoghue, *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 473 (2d Cir. 2011), these allegations support the inference that Bulldog did have access to inside information about Invesco. It is highly plausible that Invesco would have attempted to appease one of its largest shareholders – particularly one that was actively seeking an audience with management and concededly trying to "influence" it – by giving it inside information about its business strategies. In any event, information about what an issuer will not do is often as valuable as information about what it will do. Even assuming that Invesco rebuffed Bulldog's demands, Invesco effectively disclosed that it was unwilling to do what, by Bulldog's own admission, would have "afford[ed] all shareholders an opportunity to realize net asset value for their shares." That material nonpublic information was disclosed to Bulldog alone, and it is perhaps no coincidence that Bulldog sold its stock after learning it. There is no basis in the record for concluding that Bulldog was in fact a "consummate 'outsider.'"

If the Court wishes to consider a case in which a true "outsider" is held liable for short-swing insider trading, it should wait to select a case where the defendant's outsider status has been established through record evidence, not unsubstantiated rhetoric.

C. The Second Circuit Did Not Consider Other Grounds For Standing Raised in Donoghue's Briefs Below

At oral argument and in her brief, Donoghue identified a host of injuries in fact that are suffered by issuers and their securityholders because of short-swing insider trading. The Second Circuit discussed some of them, but others have not been fully addressed by any court.

For example, Donoghue contended below that issuers and their securityholders have standing under this Court's decision in *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000). *Vermont Agency* found Article III standing for a *qui tam* relator under the False Claims Act based in part on a "long tradition" of such actions. *See id.* at 774-78. This Court held that "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 774 (citations omitted); *see also Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 274 (2008); *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 382 (1980). To be sure, the tradition of *qui tam* actions reaches back centuries to England, whereas Section 16(b) harkens back to 1934. *See id.* Nonetheless, after nearly eight decades, untold lawsuits, and hundreds of judicial opinions, Donoghue contended below (and would argue to this Court) that Section 16(b) suits easily fit that description.

Vermont Agency also found "adequate basis for the [*qui tam*] relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." 529 U.S. at 772. In the Court's view, the False Claims Act "can be reasonably regarded as effecting a partial assignment of the Government's damages claim." *Id.* This theory of standing was endorsed more recently by the Supreme Court in *Sprint Communs.,* 554 U.S. at 275 ("Assignees of a claim, including assignees for collection, have long been permitted to bring suit."). Donoghue pressed this theory – and many others – below, and she would argue each to this Court if certiorari were granted.

This petition is a poor vehicle for certiorari because it would require the Court to address many statute-specific arguments for injury in fact that were not addressed by the decisions below and have never been evaluated by any judge in a Section 16(b) case. The prudent course is to allow further percolation so lower courts can consider these arguments in the first instance.

CONCLUSION

The petition for certiorari should be denied.

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Respectfully submitted,

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