No. 12-1118

IN THE
Supreme Court of the United States

JOSEPH F. APUZZO,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

REPLY FOR PETITIONER

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The Government does not contest the importance of the question presented, or the centrality of Second Circuit securities-law decisions. It admits that the judgment below introduced a circuit split. It cannot gainsay that this is *the first case* to hold that satisfying the lenient criminal aiding-and-abetting test always establishes civil liability. And despite ostensibly defending the judgment, the Government does not defend its only foundation—the proposition that a civil aiding-and-abetting statute must, "*a fortiori*," be no more demanding than a criminal aiding-and-abetting statute, no matter what their texts say, Pet. App. 14a. These points alone justify certiorari.

Seeking alternative reasoning to support the judgment, the Government labors to demonstrate that when

Congress used "substantial assistance" in 15 U.S.C. § 78t(e) (Section 20(e)), it meant nothing more than Judge Hand's test. But that cannot be true, because neither that test nor the capacious criminal aiding-and-abetting statute it glosses, 18 U.S.C. § 2(a), requires "substantial assistance"—courts consistently hold that *minimal* assistance is enough. Finally, the Government contends that the judgment below wrought no real change in the law. But it says the opposite to the public and other courts, and its *own briefing* below conceded the proximate-cause requirement. This Court should grant certiorari and reverse the Second Circuit's unsolicited and unwarranted act of judicial legislation.

I. The Government's Admissions Alone Justify Certiorari

What the Government concedes or declines to dispute is more than enough for the Court to confidently grant review.

A. The Government all but admits that this case bears the hallmarks of a certworthy dispute. It does not contest the importance of the standard for securities-law aiding-and-abetting claims. Indeed, it expansively addresses the merits (Br. in Opp. 7-20) before briefly addressing the circuit split (Br. in Opp. 20-21).

The Government acknowledges that split, only asking the Court to allow other circuits to "reconsider * * * in light of the decision below," Br. in Opp. 21.[1] But the circuit split is not limited to whether substantial assistance

[1] *SEC* v. *Tambone*, 550 F.3d 106, 145 (1st Cir. 2008), is not "best read" as holding that proximate cause "is ordinarily *sufficient* * * *, not that it is necessary." Br. in Opp. 21. That is an implausible interpretation of the holding, which cites two cases "requiring" proximate cause and then applies that test.

entails proximate cause, although that would be enough. Equally striking, *no* other court—in 40 years of civil aiding-and-abetting caselaw—has held that the unadorned criminal-law standard marks the civil violation's outermost requirements.

The Government recognizes the Second Circuit's outsized importance in federal securities cases (which is presumably why it hopes that other circuits may follow the judgment below). For that circuit to introduce a securities-law sea-change is of undoubted national significance. The question presented should not evade review because it primarily arises in the Second Circuit or because that court's position is such an outlier.[2]

B. On the merits, the Government agrees with Apuzzo that Congress intended to codify the jurisprudential consensus that the SEC must show the defendant's "substantial assistance * * * in violation of" securities-fraud laws. Section 20(e). See Br. in Opp. 8. The Government admits that the now-codified caselaw required some species of causation. Br. in Opp. 9-11, 18. That common ground cannot be reconciled with the lower court's adoption of a criminal test that requires nothing substantial or causative.

And in silent agreement with Apuzzo, the Government refuses to defend the Second Circuit's central yet unsupported "*a fortiori*" premise, from which everything in its

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[2] The need for review is especially pressing because the SEC controls whether the split is likely to deepen. Since *Apuzzo* was decided last August, the SEC has filed 11 aiding-and-abetting cases in the Second Circuit, while only one other circuit saw even two. Tellingly, it filed *none* in the First or Eighth Circuits—the very circuits the Government urges might "reconsider" their position that proximate cause is required. These data are available in Westlaw's "Filing-All" database.

judgment flowed. Pet. App. 14a. The Government does not dispute Apuzzo's observation that civil elements for liability not only can be, but sometimes *are*, more demanding that their criminal-law counterparts. See Pet. 24-26 & n.9.

The Government, therefore, is in the anomalous position of desiring to preserve the Second Circuit's *result*, which amplifies the SEC's power, while seeking to distance itself from that result's bankrupt foundation.

II. The Government's Clouding Of The Issue Is Unavailing

A. Pre-Section 20(e) cases required proximate cause (or a "substantial causal factor")—and *none* adopted the criminal-law test

Searching for something other than the indefensible "*a fortiori*" rationale to support the judgment, the Government fabricates a legal regime in which "substantial assistance" or "substantial causal factor" has never required "proximate cause." See Br. in Opp. 9. But actual case law routinely equates those concepts—and so did the Government itself, until now. Regardless, no case (before this one) held that the criminal standard *vel non* equates to substantial assistance.

1. The Government embraces *Landy* v. *FDIC*, 486 F.2d 139, 163 (3d Cir. 1973), under which "substantial assistance" entails a "substantial factor in causing" the tort or violation. See Br. in Opp. 8-10. Thus, the real dispute between Apuzzo and the Government reduces to whether the test is "proximate cause" or "substantial factor in causing." Apuzzo believes those standards are identical. The Government mistakenly believes that "substantial factor in causing" is barely more than but-for causation. See, *e.g.*, Br. in Opp. 9, 18. But the dispute is of no moment, because the judgment below conflicts with *both*

formulations.

Despite occasionally varying terminology, pre-Section 20(e) courts and commentators agreed that proximate cause was central to the substantial-assistance element. Even the Government acknowledges that *six* appellate cases *expressly* used the "proximate cause" test. Br. in Opp. 11-12. Not every case needed to use those very words, and the Government is quite right that some cases did not use them. Some used variants of "substantial causal factor"; others, citing only or primarily Judge Hand's test, found complaints insufficient. Br. in Opp. 8-9, 10-11, 16, 17. Crucially, however, the Government does not contend that any case omitting the words "proximate cause" was decided differently than it would have been had that test been expressed.[3]

Thus, there was no confusion when Section 20(e) was enacted. The leading contemporaneous treatise—while fully aware of the varying formulations that the Government seizes upon—recognized essential harmony: "[T]o establish the required substantial assistance by the aider and abettor, the complaining party must prove that the actions and/or inactions of the alleged aider and abettor were a substantial, proximate causal factor of the pri-

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[3] Sometimes, the Government says, cases only "required that the substantial assistance ha[d] proximately caused the *private plaintiff's losses*," rather than the securities-law violation. Br. in Opp. 11-12. But it immediately quotes cases requiring *both*. See Br. in Opp. 12 (citing, *e.g.*, *Armstrong* v. *McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983) (requiring "proximate cause of the churning *and* the fund's resultant losses") (emphasis added)). Moreover, even cases that discussed only proximate cause of loss support Apuzzo's view; in discounting such cases (Br. in Opp. 14-15), the Government ignores Apuzzo's explanation that, in SEC actions, the "loss" is the violation itself; the SEC, unlike private plaintiffs, seeks to deter and punish *violations*, not recover compensation for *losses*. Pet. 32-33.

mary violation and loss." 4 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud, §8.5(650), p. 8:559 (1993). Section 20(e) codified this view two years later.

The Government misapprehends the import of civil cases that cited the criminal test. Apuzzo has never disputed that Judge Hand's test could be *relevant* to deciding civil aiding-and-abetting motions to dismiss. While that test cannot verify a civil complaint's adequacy, it *can* show *in*adequacy.[4] For if the SEC cannot even allege the desultory assistance required under §2(a), it could never satisfy Section 20(e)'s more demanding substantial-assistance test. See, *e.g.*, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 35-36 (D.C. Cir. 1987) (cited by Br. in Opp. 16, 17).

The Government's focus on minor variations in pre-Section 20(e) cases is either irrelevant, or helps Apuzzo by showing that this Court's resolution would iron out any remaining wrinkles. Had Congress wished to adopt the criminal test as the *sine qua non* for Section 20(e) liability, it would have cut-and-pasted §2(a)'s language—as it had in other civil aiding-and-abetting statutes. See Pet. 28. But it did not. This Court should not let stand the Government's attempt to overrule Congress's textual choice through reimagining the historical meaning of "substantial assistance."

2. The Government's earlier position *in this case* reflected the well-settled nature of the proximate-cause requirement. In both lower courts, the Government conceded that it *did* have the burden to allege "proximate

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[4] This was the Second Circuit's pre-*Apuzzo* approach. See *SEC* v. *DiBella*, 587 F.3d 553, 566-567 (2d Cir. 2009) (stating criminal test before applying the three-part test that is "specific to securities violations"—including the "proximate cause" requirement).

cause." Pet. 7, 9 (quoting SEC briefs).

Yet the Government now brazenly declares that the Second Circuit "*agreed with the Commission*" that the substantial-assistance element does not require that the assistance proximately caused the primary violation. Br. in Opp. 5 (emphasis added). That result may delight the Government, but suggesting that it *sought* that result misrepresents the record.

The Government persists in its chutzpah by claiming Apuzzo "did not raise the argument below" that Section 20(e) codified the extant caselaw's proximate-cause requirement. Br. in Opp. 7. Where, as here, the parties *agreed* on the proximate-cause test, which circuit precedent dictated (see *SEC* v. *DiBella*, 587 F.3d 553, 566 (2d Cir. 2009)), Apuzzo had no reason to belabor the test's historical underpinnings to the court. When the Second Circuit jettisoned its precedent, Apuzzo promptly raised the historical background in his petition for rehearing *en banc*, to no avail. Regardless, Apuzzo has *always* contended, as he does now, that proximate cause was required yet not alleged; additional *reasons* offered here in response to the Second Circuit's unilateral elimination of that requirement raise no new *argument* in this Court. This "vehicle" problem is illusory.

B. The Government cannot square Judge Hand's test with "substantial assistance"

1. The Government contends that "substantial assistance" and Judge Hand's test have "the same basic thrust," Br. in Opp. 16, and generate the same results, see Br. in Opp. 18, 20. But it cites *no* cases, before or after Section 20(e), upholding the sufficiency of a complaint that (1) met Judge Hand's criminal-law standard but (2) did not constitute proximate cause of the securities-law

violation.[5] That is because the criminal test is the opposite of *substantial* assistance.

Judge Hand's broad test is a faithful construction of § 2(a), which was written for breadth ("aids, abets, counsels, commands, or procures"), and has no substantial-assistance requirement. See Pet. 25-26, 29-30. His test demands only that the defendant:

- "in *some sort* associate himself with the venture,"
- "participate in it as in something that he *wishes* to bring about," whether or not his participation actually plays any role in "bring[ing] about" the primary violation, and
- "*seek* by his action to make it succeed," whether his action is effectual or not.

United States v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added).

Contrary to the Government's argument, courts have repeatedly held that the Hand test does *not* require substantial assistance. Judge Hand wrote in *Peoni* itself that his test's "definitions have *nothing whatever* to do with the probability that the forbidden result would follow upon the accessory's conduct," *ibid.* (emphasis added). Cases confirm how easily satisfied his test is.

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[5] Lacking even one such case, the Government turns to the Restatement, asserting that revisions gutted its "substantial factor" requirement. See Br. in Opp. 9. To the contrary, the Restatement explained that much more than but-for cause is required: there is no "legal cause" unless the negligence is "a substantial factor in bringing about the * * * harm." Restatement (Second) of Torts § 431 cmt. a (1965). Tellingly, the Government never disputes that "legal cause" and "proximate cause" are substantively alike. See Pet. 16 n.5.

"[P]articipation of relatively slight moment is sufficient," *United States* v. *Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008), and even an "act of relatively slight importance" will do, *United States* v. *Burrell*, 496 F.2d 609, 610 (3d Cir. 1974). A defendant must participate "to whatever slight degree" in achieving a primary violation, *Davis* v. *United States*, 362 F.2d 964, 965 (D.C. Cir. 1966). One can be liable for merely "counsel[ing]" a primary violator." §2(a). Indeed, wholly *ineffective* assistance—*e.g.*, "the defendant knew of the crime and *attempted* to facilitate it," *United States* v. *Frorup*, 963 F.2d 41, 43 (3d Cir. 1992) (emphasis added)—can satisfy the criminal test. This is a far cry from "substantial assistance."

2. The Government (Br. in Opp. 19 n.4) argues that the Second Circuit justifiably ignored Section 20(e)'s text, and imposed the criminal standard, because some courts interpreting the Investment Advisers Act apply the three-part civil test despite the Act's adoption of §2(a)'s text. But see Pet. 28 (collecting cases correctly applying Judge Hand's test in that context). Two wrongs do not make a right. The Court can resolve two splits at once simply by demanding that lower courts give meaning to the textual option Congress selected.

3. Finally, the Government commandeers *Central Bank* for the proposition that, wildly differing texts or not, Judge Hand's test and substantial assistance are the same. It ignores Apuzzo's discussion of that case, see Pet. 27, instead repeatedly citing (Br. in Opp 16-17, 18, 19) the observation that the Restatement, "under a concert of action principle, accepts a doctrine with rough similarity to criminal aiding and abetting." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994). But that uncontroversial statement (*all* aiding-and-abetting regimes have *rough* simi-

larity) directly precedes the Court's *refusal* to import the criminal standards into civil claims without specific congressional guidance, *id.* at 182-184.

C. The judgment below changed the law

The Government even seeks to rewrite history, asserting that Judge Hand's test and "substantial assistance" have *always* been the same. It chastises Apuzzo for "incorrect[ly]" arguing that "the court of appeals departed from the established understanding of 'substantial assistance' and expanded the reach of aiding-and-abetting liability." Br. in Opp. 15. But elsewhere, the Government has lauded the Second Circuit's revolution for what it is—a major boost to the Government's own power. Courts have also recognized the change.

1. At the recent "The SEC Speaks" conference, the Chief Counsel of the SEC's Enforcement Division praised the judgment below as an antidote to this Court's decision in *Janus Capital Group* v. *First Derivative Traders*, 131 S.Ct. 2296 (2011). He celebrated that *Apuzzo* allows the SEC to bring secondary-liability claims whenever *Janus* blocks primary liability, and expands aiding-and-abetting liability generally:

> [A]s a result of the Second Circuit's decision last year in *SEC* v. *Apuzzo*, *proving aiding-and-abetting liability is easier for us*. * * * [T]he Second Circuit reversed [the district court], holding that proximate causation is not required, and that the standard that applies in aiding and abetting for the substantial-assistance requirement is the sort of longstanding criminal requirement, that the defendant just has to have associated themselves in some way with the enterprise and tried to make it succeed. *That's a very helpful ruling from our perspective.*

Joseph K. Brenner, Remarks at The SEC Speaks in 2013, "Enforcement" segment, Practising Law Institute (Feb. 22, 2013).[6] The wider legal community is aware of these remarks.[7]

The Government has also emphasized the change in law to the judiciary. One SEC brief emphasized that the judgment below "overruled *sub silentio*" case law that required proximate causation. Reply in Support of Mot. for Summ. J., Doc. No. 54, *SEC* v. *Garfield Taylor Inc.*, No. 1:11-CV-020540-RLW (D.D.C.), at 10 (filed Nov. 13, 2012).

2. Courts likewise have had no trouble recognizing the change. The Government misleadingly brushes aside the Second Circuit's own prior *holding* that the SEC must plead and prove proximate cause. See Br. in Opp. 15 n.2 (asserting only a "passing reference" to proximate cause in *DiBella*).[8] And it wholly ignores that, until the judgment below, the securities-savvy district courts within the Second Circuit uniformly enforced the SEC's duty to allege proximate cause. Only *because of* the judgment below has the SEC been relieved of this requirement. See Pet. 19-20, 22. That is a law change of considerable proportion, notwithstanding the Government's pretense that nothing has changed.

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[6] Conference proceedings are available online at: http://www.pli.edu/Content/OnDemand/The_SEC_Speaks_in_2013/_/N-4nZ1z12p7x?Ns=sort_title%7C0&ID=157975 (fee required). The quoted comments appear at 33:45 to 34:32 in the "Enforcement" segment.

[7] *E.g.*, http://newsandinsight.thomsonreuters.com/New_York/Insight/2013/03_-_March/SEC_Speaks_2013__Waiting_for_the_new_guard/.

[8] *DiBella* expressly determined that the proximate-cause requirement applied to SEC cases, 587 F.3d at 566 & n.9, and then found that the SEC satisfied it, *id.* at 567.

III. THE SECOND CIRCUIT INVADED CONGRESS'S SPHERE

The Second Circuit's unabashed purpose was to increase the number of aiding-and-abetting defendants. It complained that if the statute were enforced as written (rather than as §2(a) was written), too few people would be held liable.[9] Pet. App. 17a. That is a naked policy argument. This Court recently reversed in similar circumstances, where the same district judge sitting by designation sought to expand SEC authority, despite "the lack of textual, historical, or equitable" justification. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013), rev'g 653 F.3d 49 (2d Cir. 2011) (Rakoff, D.J.).

Nor is there any indication that the proximate-cause requirement has rendered Section 20(e) ineffective. Multiple cases—like *DiBella* and *Tambone*—have found proximate cause established, permitting cases to proceed. See also Pet. App. 54a-56a, 58a-59a.

If the words "substantial assistance" are to be eliminated, and civil aiding-and-abetting elements aligned with §2(a), that result should only be achieved by legislation, not judicial fiat. Pet. 31-32 (noting that Congress lessened Section 20(e)'s scienter requirement, but left the substantial-assistance requirement untouched).

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[9] The Government joins the court below in mischaracterizing Apuzzo's position as requiring that an aider's action be "*the* direct cause of the fraud." See Br. in Opp. 14 (emphasis added). From that straw-man premise, it leaps to conclude that "only those who make fraudulent misrepresentations themselves" could be liable as aiders under Apuzzo's view. *Ibid.* Apuzzo has never endorsed this position. An aider may be held liable if he was a proximate cause of the primary violation (*i.e.*, the misrepresentations); he need not personally commit the primary violation.

Respectfully submitted.

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