No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,
Petitioner,
v.

GLEN BILLING, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, the Washington Legal Foundation respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioners.

The Washington Legal Foundation ("WLF") has received written consent from petitioners to file this brief and has filed such consent with the Clerk of the Court. WLF has been unable to obtain respondents' consent, thereby necessitating this motion.

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 366 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF has no financial interest in the outcome of this case.

WLF is concerned that if the Second Circuit's decision below is not reversed, the result will be conflicting or duplicative over-regulation of critical aspects of the capital formation process in the United States, contrary to Congress' express decision to commit regulation of such activities to the expert judgment of the Securities and Exchange Commission, and likely to interfere with the preeminence of the U.S. capital markets in the global arena.

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), the Washington Legal Foundation respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of Petitioners.

Respectfully submitted,

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 366 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *In re Stock Exchanges Options Trading Antitrust Litig*., 317 F.3d 134 (2d Cir. 2003). WLF has no financial interest in the outcome of this case.

WLF is concerned that if the Second Circuit's decision below is not reversed, the result will be conflicting or duplicative over-regulation of critical aspects of the capital formation process in the United States, contrary to Congress' express decision to commit regulation of such activities to the expert judgment of the Securities and Exchange Commission ("SEC") and likely to interfere with the preeminence of the U.S. capital markets in the global arena.

SUMMARY OF ARGUMENT

Implied antitrust immunity often attaches when conduct is subject to a "detailed regulatory scheme." *Verizon*

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation or submission of this brief.

Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 406 (2004). The alleged tie-in and other arrangements here are necessarily immune from antitrust attack because they are actively regulated by the SEC under three broad grants of statutory authority. Subjecting petitioners here to antitrust liability would pose an actual or potential conflict with the SEC's regulatory scheme.

Moreover, the SEC's congressional mandate expressly incorporates antitrust's goal of promoting fair and competitive markets. Congress has also enacted reform legislation and other procedural safeguards against abusive litigation to complement SEC enforcement. Layering treble-damage antitrust suits on top of this already robust framework threatens to over-deter conduct that is beneficial and even crucial to the proper functioning of U.S. equity markets. Given the mounting perception abroad that U.S. markets are replete with regulatory and litigation risks, the specter of antitrust liability will only further diminish the attractiveness and competitiveness of the U.S. with respect to global capital-raising activities.

ARGUMENT

I. IMPLIED ANTITRUST IMMUNITY ATTACHES TO THE CONDUCT ALLEGED BY RESPONDENTS.

The Second Circuit in its opinion below is the first and only court to have rejected the SEC's view that implied antitrust immunity is necessary to allow the agency to perform its regulatory functions. The Second Circuit's opinion creates a novel test for application of the doctrine of implied antitrust immunity that is inconsistent with this Court's precedents. As the Court explained in *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), when a regulatory structure "designed to deter and remedy anticompetitive harm" exists, "the additional benefit to competition provided by antitrust enforcement" is "small" and it is "less plausible that the antitrust laws contemplate such additional scrutiny." *Id*. at 412. Indeed, a "detailed regulatory scheme" "ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Id*. at 406, citing *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Gordon v. New York Stock Exch*., 422 U.S. 659 (1975). Here, the SEC, applying its expertise regarding securities law and the securities markets, regulates precisely the type of behavior that respondents challenge. The potential for conflict with the antitrust laws requires application of the implied immunity doctrine.

Respondents, who invested in Initial Public Offerings ("IPOs") and purchased shares directly from petitioners or indirectly on the aftermarket, allege an antitrust conspiracy involving underwriters' formation of syndicates to spread out the risk inherent in the IPO market. *See* Am. Compl. ¶¶ 37-38, *see also* Pet. App. 91a. As part of this conspiracy, respondents allege that petitioners (i) made inquiries concerning the number of shares customers would be willing to purchase in the aftermarket, and the prices persons would be willing to pay (*id*. ¶¶ 45, 54); (ii) shared the identities of IPO allocants and divided responsibilities among members of the syndicate (*id*. ¶¶ 39, 56); (iii) participated in registered stock exchanges, such as the New York Stock Exchange ("NYSE"), and other self-regulatory organizations ("SROs"), such as the NASD (*id*. ¶¶ 46-47); and (iv) favored long-term investors over "flippers" of IPO shares (securities purchasers who sell the securities they buy after a short period of time) (Pfeiffer Compl. ¶¶ 64-65, 81). Respondents also allege that the underwriters conspired to impose "anticompetitive charges" in the form of "tie-in" or "laddering" requirements. These alleged obligations purportedly required purchasers to commit to purchase securities in the aftermarket at escalating prices, to purchase the issuer's securities in subsequent offerings, or to purchase other, possibly less attractive securities. *See* Pet. App. 17a-18a, 73a-74a, Am. Compl. ¶¶ 1-7.

A. The SEC Regulates The Conduct At Issue Under Three Statutory Schemes.

Three general sources of regulatory authority grant the SEC broad power to regulate the activity at issue. First, the SEC has power under the Securities Act, 15 U.S.C. §§ 77a, *et seq*., to regulate the offering process, including communications during so-called "road shows" to "build books" during the IPO process. *See* Memorandum Amicus Curiae of the SEC Submitted at the Request of The Court ("SEC Brief"), Pet. App. 132a-133a (citing 15 U.S.C. § 77(b)(a)(3), which excludes communications among underwriters who are in privity of contract with the issuer of the security from the scope of the offering restrictions; 17 C.F.R. § 230.134, which assists the process of building the book by permitting collection of indications of interest in the IPO; and 17 C.F.R. §§ 230.137-139, which discuss permitted communications through issuance of research reports).

Second, under the Securities Exchange Act, 15 U.S.C. §§ 78a, *et seq*. ("Exchange Act"), the SEC has authority to define manipulative practices and adopt rules to permit and regulate, or to proscribe and prevent, such practices. *See* SEC Brief at 134a (citing 15 U.S.C. § 78i(a), which outlaws certain forms of manipulative conduct involving securities listed on exchanges, and also empowers the SEC to determine whether certain potentially abusive practices involving those securities should be prohibited, permitted, or regulated; 15 U.S.C. § 78j(b), which gives the SEC rulemaking authority to address manipulation and fraud, making it unlawful for any person to employ "any manipulative, deceptive, or other fraudulent device or contrivance in contravention of such rules as the Commission may prescribe"; and 15 U.S.C. § 78o(c)(1), which prohibits broker-dealers from effecting any securities transaction "by means of any manipulative, deceptive, or other fraudulent device of contrivance" and also gives the Commission the power "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."). In addition, 15 U.S.C. § 78i(a)(6) authorizes the SEC to regulate transactions effected "for the purpose of pegging, fixing, or stabilizing the price of [a] security ...."

Third, the SEC oversees broker-dealer conduct, including communications, commissions, and underwriter fee arrangements, both directly and through its regulatory oversight of the NASD. *See* Exchange Act, 15 U.S.C. §§ 78c(a)(26), 78o, 78o-3(a)-(b). Section 15A(e) of the Exchange Act, 15 U.S.C. § 78o-3(e), and NASD Rule 2740 have the effect of requiring that members of underwriting syndicates be members of the NASD, so NASD rules governing offerings apply to all syndicate participants. *See* SEC Brief, Pet. App. at 136a. The rules of the NASD – an SRO – go into effect only after the SEC finds them consistent with securities law requirements. *See* 15 U.S.C. §§ 78o-3(b)(6), 78s(b)(1).

These three sources of statutory authority are not empty shells. The SEC actually and actively regulates the conduct at the core of respondents' complaints under the statutory authority granted to it. A 1974 proposed SEC rule would have barred underwriters from requiring payments, including certain forms of tie-in arrangements, in addition to the IPO share price. *See* Proposed Rule 10b-20, Release No. 10636, 39 Fed. Reg. 7806 (Feb. 11, 1974). The SEC withdrew the proposed rule in 1988, *see* Release No. 26182, 53 Fed. Reg. 41,206 (Oct. 20, 1988), because it considered, but eventually rejected, imposing bright-line rules concerning tie-in arrangements and other aftermarket practices, "favoring instead a flexible regulatory approach under its general anti-fraud provisions, now embodied in Regulation M." Pet. App. 112a. Regulation M, found at 17 C.F.R. §§ 242.100-105, contains "prophylactic prohibitions" "intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the 'true' state of the public market for the security being distributed." SEC Brief, Pet. App. 135a. In particular, Regulation M prohibits issuers, selling security holders, underwriters, and other distribution participants from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the specified restricted period. Regulation M also governs "stabilization" (efforts to prevent the price to fall below the offering price during the offering) and related activities in connection with an offering. *See id*.

Regulation M thus focuses on the very behavior challenged by respondents in this case. However, determining whether or not activity is prohibited by Regulation M is not a mechanical exercise. The SEC has emphasized that whether a communication constitutes permissible book-building or an attempt to induce a bid or purchase in violation of Regulation M "depends on the particular facts and circumstances ...." Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release Nos. 33-8565, 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ("Allocations Guidance"), Pet. App. 225a. Thus, underwriters may lawfully discuss with potential investors the investors' desired long-term future position in a security, the price at which the customer might accumulate that position, and whether and at what price the investor will hold the securities or sell the shares in the immediate aftermarket. *See id*. at 224a. The SEC contrasts these permissible discussions with impermissible statements that immediate aftermarket buying would help investors obtain allocation of "hot" IPOs. *See id.* at 227a. The differences between permissible and impermissible discussions may be vanishingly small.

B. The Potential For Conflict Between SEC Regulation And Antitrust Law Requires Application Of The Implied Immunity Doctrine.

The conduct at issue here – conduct involving the IPO book-building process – is subject to SEC regulation. In particular, the alleged tie-in and other arrangements challenged by respondents are actively regulated by the SEC. Under this Court's precedents, antitrust law's potential or actual conflict with securities regulation triggers the implied immunity doctrine.[2]

In *Gordon*, the Court applied the implied immunity doctrine to reject a private antitrust challenge to the practice of securities exchanges' and their members' fixing of commission rates. In so doing, it recognized that implied immunity attaches not only when there is a "pervasive" regulatory scheme, but also when the regulatory agency has regulatory authority over the conduct in question and has exercised that authority. *See* 422 U.S. at 688-89. Although the fixing of commission rates was prohibited at the time by both the securities laws and the antitrust laws, because the SEC had the statutory authority to permit such conduct in the future, the Court perceived a potential conflict. *See id.* at 690-91. The plaintiffs in *Gordon*, the Court wrote, had

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[2] Although the challenged conduct at issue here may also be immune under the "pervasive regulation" test for immunity articulated in *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), the Court need not reach that question to conclude that implied immunity attaches under the actual or potential conflict rule.

confused two questions – the factual question whether fixed commission rates are actually necessary to the operation of the exchanges and the legal question "whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates." *Id*. at 688.[3] In other words, the relevant question was not whether antitrust law allowed or disallowed the fixing of commission rates, but whether antitrust immunity must be implied in order to permit the Exchange Act to function as envisioned by Congress. *See id*. In answering this question in the affirmative, the Court wrote that "if antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." *Id*. at 689.

The potential for conflict in *Gordon* existed because the securities laws and the antitrust laws advance different goals. "[T]he sole aim of antitrust legislation is to protect competition whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Id*. at 689. Therefore, application of the antitrust laws, which would bar fixed commission rates as a *per se* violation of the Sherman Act, "would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Id*. at 691. Importantly, Congress confirmed the divergent goals of SEC regulation and antitrust law when it amended the Exchange Act in 1996 to provide that when the SEC is engaged in rulemaking "and is required to consider or determine whether an action is necessary or appropriate in the public interest," it "shall also consider, in addition to the

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[3] *See also National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (the ultimate issue is whether permitting antitrust liability is clearly repugnant to the regulatory *system*).

protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id*. 15 U.S.C. § 77b(b). This statutory mandate directs the SEC to consider competition as only one of three factors in its rulemaking capacity. Logically, this directive raises the possibility that the SEC may adopt rules that are not wholly consistent with the narrow purposes of competition law.

The Second Circuit's decision in *Friedman v. Salomon/Smith Barney, Inc*., 313 F.3d 796, 799 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003), confirms that, as the district court below succinctly stated, "the ... 'repugnancy' required to trigger implied immunity need not be a firefight between the antitrust laws and securities regulation, but rather 'extends to potential as well as actual conflicts.'" Pet. App. 82a, quoting *Friedman* at 799. In *Friedman*, although the SEC did not expressly permit broker-dealer restrictions to discourage the "flipping" of IPO shares in order to stabilize aftermarket prices, the Second Circuit nevertheless found that implied antitrust immunity attached to such practices, reasoning that allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct. *Friedman*, 313 F.3d at 801. Similarly, in *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003), although the practice of restricting equity options trading to one exchange was prohibited by both antitrust law as well as the securities laws, the Second Circuit found that implied immunity attached to the practice because the SEC had ample statutory authority, which it had repeatedly exercised, to regulate the listing and trading of equity options, and the specific conduct at issue fell within that broader authority. *See id*. at 150. "The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Id*. at 149. Here, as discussed above, the SEC has ample statutory authority to regulate the entire IPO process, and in fact exercises that authority.

Respondents' rejoinder that immunity should not attach to alleged conduct that the SEC does not and cannot permit – *i.e.*, excessive commissions, or laddering arrangements designed to increase securities prices – is misplaced. Allowing antitrust actions challenging the same conduct forbidden by the securities laws and the SEC would expose defendants to duplicative standards and liability. *See NASD*, 422 U.S. at 735. Under *Trinko*, when a regulatory structure "designed to deter and remedy anticompetitive harm" exists, "the additional benefit to competition provided by antitrust enforcement" is "small" and it is "less plausible that the antitrust laws contemplate such additional scrutiny." *Id*. at 412. As discussed below in Section II, the SEC robustly enforces the securities laws and its own regulations as they apply to the IPO formation process. Antitrust damages are not necessary to ensure compliance with securities law.

Moreover, as discussed *supra*, the line between permissible and impermissible communications during the IPO book-building process is a very fine, and wavering, one. Thus, for example, "[c]ommunicating to customers that expressing an interest in buying shares in the immediate aftermarket ('aftermarket interest') or immediate aftermarket buying would help them obtain allocations of hot IPOs" would be contrary to SEC regulations. However, "inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct." Allocations Guidance, Pet. App. 227a. As the SEC noted in its

Allocations Guidance, the lawfulness of behavior in this area "depends on the particular facts and circumstances surrounding such activity or communication." *Id*. at 225a.

Notably, the SEC's guidance in this area has changed over time, and is likely to change in the future as the SEC's understanding of the issues evolves. When the Commission proposed and adopted Regulation M, it announced that it would gather information about activities in the aftermarket for offerings so that it could evaluate whether any additional regulation was necessary. *See* SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996); SEC Release No. 33-7375, 62 Fed. Reg. at 537-38. The Commission planned this review:

> in order to address commenters' concerns that certain aftermarket activities were manipulative. Pursuant to that announcement, the Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether the provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.

SEC Brief, Pet. App. 137a. In August 2002, the SEC Chairman requested the NYSE and NASD to appoint a "Blue Ribbon Panel" to investigate whether additional rulemaking is required. The SEC asked those SROs "to undertake a broader review of the IPO process to determine if the additional rulemaking being contemplated will be sufficient to strengthen the integrity of the offering process and to better protect investors." *Id*. at Pet. App. 139a. The NYSE/NASD IPO Advisory Committee issued its final report and recommendations concerning the hot IPO market of the late 1990s and 2000 in May 2003. *See* SEC Letter Brief of March 21, 2005, Pet. App. 194a. And, on October 13, 2004, the SEC proposed amendments to Regulation M that, among other things, would add a new Rule 106 to expressly prohibit distribution participants, issuers, and their affiliated purchasers, directly or indirectly, from demanding, soliciting, attempting to induce, or accepting from their customers any consideration in addition to the stated offering price of the security. *See* Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004), SEC Letter Brief of March 21, 2005, Pet. App. 194a-195a.

Respondents assume that the SEC cannot authorize certain conduct they have challenged. But, as the district court below wrote,

> [U]nder the broad exemptive powers of the Exchange Act, the SEC has the power to permit a national securities association or exchange to fix any commission or fee structure it sees fit, or to permit certain types of discrimination in the imposition of commissions or fees. Consequently, the SEC, and by extension, the NASD, may permit the conduct related to commission practices alleged in this case.

Pet. App. 108a-109a (footnote omitted) (citing, *inter alia*, 15 U.S.C. § 78mm ("The Commission ... may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder.")). *See also* SEC Letter Brief of March 21, 2005 (the SEC "has broad authority over the registered securities offering process, including authority to permit at least some agreements among underwriters that can have the effect of *increasing* the aftermarket price over the price that would prevail in the absence of those agreements ...") (Pet. App. 189a) (emphasis supplied).

Even assuming, *arguendo*, respondents were correct that there is behavior that is beyond the power of the SEC to expressly authorize, it is not possible to define that core with any precision, and the core itself may shift, expand, or contract over time as the SEC refines its regulatory thinking and applies its judgment to specific facts. Certainly an antitrust court, at the pleading stage of litigation, when confronted with a somewhat vague and general complaint, cannot make secure judgments about whether challenged conduct lies clearly within, or clearly without, that core. Unless implied immunity attaches to the zone of activity (such as the alleged conduct challenged by respondents) regulated by the SEC, defendants will be exposed to antitrust lawsuits and potential treble damages for conduct that, if evaluated by the SEC on a full record, might be found to be permissible. Because immunity typically attaches at the motion to dismiss stage, *see Behrens v. Pelletier*, 516 U.S. 299, 308 (1996), antitrust courts, if not barred from doing so by this Court, will in many cases permit claims to proceed to summary judgment or trial based on conduct that may be permissible under SEC regulations, current or future. This result would effectively vitiate the implied immunity that otherwise would, and should, attach.

The Court need not look at the SEC's broad, general regulatory powers and embrace the pervasive regulation theory of implied immunity to reach this conclusion. Rather, the Court need only observe that the SEC has the power under Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6), to prohibit or allow transactions intended to fix or stabilize securities prices, and that it has the power under Section 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), to define prohibited trading practices intended to raise or depress prices. Given the fact-intensive inquiry necessary to determine whether a particular practice, in its full factual context, falls within Section 9(a)(2), or within Section 9(a)(6), or both,[4] and given the SEC's ongoing consideration of IPO communications practices and the possibility it may through additional regulation alter the lines being drawn, "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." *Friedman*, 313 F.3d at 801.

As the United States noted in its *amicus curiae* brief, a related but distinct point is that "a complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability." U.S. Cert. Br. at 8. Stated otherwise, implied immunity "encompasses activities that are directly related to and cannot practically be separate from authorized conduct." *Id*. at 11, citing *NASD*, 422 U.S. at 733-34. Thus, while the analysis in the above few paragraphs focuses on the inherent problem in determining at the pleading stage whether activity falls within or without the nuanced and evolving borders of SEC approval, the point here is that where core conduct impermissible under securities law is inextricably intertwined with other conduct that is permitted by the SEC, all of the conduct falls within the field of implied immunity.

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[4] It is not at all obvious, in the absence of a full factual record, whether a particular practice is intended to, and has the effect of, merely fixing or stabilizing securities prices, or whether it is intended to, and has the effect of, raising securities prices.

In addressing the problem of inextricable intertwinement, the United States proposed that the district court allow the respondents an opportunity to re-plead their complaint in order to determine whether they can avoid the problem. *See* U.S. Cert. Br. at 13-15. We respectfully submit that leave to amend would not be appropriate here. In this case, the district court could only decide that the activities forbidden by the SEC are inextricably intertwined with the book-building and associated IPO activities permitted by the SEC. As the SEC has written, the "syndicate underwriting of public offerings inherently involves agreements and joint actions among potential competitors, including agreements about price, that, but for the securities regulatory regime, would raise substantial antitrust concern." SEC Letter Brief of March 21, 2005, Pet. App. 192a. Here, the activities respondents challenge that they assert is beyond the power of the SEC to expressly approve are *necessarily* intertwined with "agreements and joint actions" between and among IPO syndicate members to build the book. Therefore, they cannot be disaggregated and challenged in a regulatory vacuum. Implied immunity necessarily attaches.

II. THROUGH THE SECURITIES LAWS AND THE SEC, CONGRESS HAS ENACTED A ROBUST SYSTEM TO REGULATE THE CONDUCT AT ISSUE HERE.

A. The Securities Laws, The SEC's Rule-Making, And The NASD's Rules Establish A Comprehensive Scheme To Regulate All Aspects Of The IPO Process.

Congress has granted the SEC broad general authority to regulate the allocation of IPO shares and underwriter commission practices through: (1) the Securities Act, under which the Commission regulates the offering process; (2) the

Exchange Act, under which the Commission defines and regulates manipulative acts in connection with the purchase or sale of securities; and (3) its reservoir of rulemaking authority over SROs. Taken together, these numerous requirements form a robust scheme of regulation that is continually evolving. The legislation and regulation covering the IPO process are spelled out in detail *supra* at Section I. Certain points in that discussion bear amplification here.

First, Congress – through the securities laws and its endorsement of the SEC's rule-making powers – has created a complete scheme to regulate stabilization and manipulation. The SEC has traditionally recognized certain "stabilizing" activities as legitimate and permissible under Section 9(a)(6) of the Exchange Act and SEC Rule 10b-1, 17 C.F.R. § 240.10b-1.

Second, Congress has entrusted the SEC with regulating underwriter compensation in addition to its efforts to regulate price stabilization. Under the Exchange Act, Congress empowered the SEC to supervise commission rates. *Gordon*, 422 U.S. at 690-91. Pursuant to this authority, the SEC requires underwriters to disclose their compensation and the amount of discounts and commission to be paid to the underwriter in connection with an IPO. 17 C.F.R. § 229.508(e). The SEC has allowed NASD rules in turn to define what constitutes underwriter compensation and to limit the amount of compensation underwriters may receive from issuers. NASD Rule 2710. The NASD has also adopted rules, approved by the SEC, that govern the fairness of and disclosures regarding underwriter commissions charged to customers and that provide the factors that underwriters must consider in setting their compensation. NASD Manual, IM-2440.

Third, the securities laws and the SEC's rules thereunder extensively regulate the "syndicate" process and communications between syndicate members and their customers.[5] Indeed, the SEC has "power to regulate all aspects of the syndicate system." 15 U.S.C. § 77b(a)(3). For example, the Securities Act and rules adopted and implemented by the SEC under its grant of power impose restrictions on the IPO process. Section 5 of the Securities Act, 15 U.S.C. § 77e, imposes restrictions on non-exempt offerings of securities, including prohibitions on offers before a registration statement is filed, as well as limitations on oral and written communications with potential buyers after the registration statement is filed but before it becomes effective. Section 2(a)(3) excludes from those offering restrictions certain communications, including preliminary negotiations or agreements between an issuer and any underwriter. 15 U.S.C. § 77b(a)(3). However, SEC Rule 134 under the Securities Act permits broker-dealers to collect from potential buyers "indications of interest" in an IPO prior to its issuance. 17 C.F.R. § 230.134(d). In addition to the Securities Act and the rules prescribed by the SEC thereunder, the NASD comprehensively and actively regulates syndicates, including their formation, communications among members, commission structure, allocation of securities and fee arrangements. For example, NASD Rule 2110 and interpretation IM-2110-1 require all participants in an offering syndicate to make bona fide public distributions, and prohibit them from either withholding securities for their own benefit or using an allocation of securities to reward persons for future business.

[5] The "Papilsky Release" (Exchange Act Release No. 17371, 21 S.E.C. Dkt. 930 (Dec. 12, 1980) provides an overview of the syndicate system and describes the broad discretionary authority typically granted to the managing underwriter by the "agreement among underwriters … that establishes the obligations of each [syndicate] member").

B. Plaintiffs' Antitrust Allegations Are A Thinly Veiled Attempt To Avoid The Rigorous Pleading And Culpability Standards Under The Securities Laws.

Allowing this suit to proceed under the antitrust laws will thwart Congress' clearly expressed intent to reduce abusive "strike suits" under the securities laws. More than 300 consolidated actions have been filed under the securities laws concerning the conduct alleged here. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006). These lawsuits – many brought by the same plaintiffs' lawyers involved here – are premised on allegations of tie-in arrangements, underwriter compensation, and analyst reports. *Id.* at 27-28.

These lawsuits allege violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and are accordingly subject to rigorous scrutiny under the Private Securities Litigation Reform Act of 1995 ("Reform Act") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). *See* 15 U.S.C. § 78u-4(b). Through the Reform Act, Congress sought to reduce the volume of abusive federal securities litigation through heightened pleading standards, the loss causation requirement, the automatic stay of discovery, and procedural limits on maintenance of class actions. *See* 15 U.S.C. § 78u-4. *See*, *e.g.*, *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005) (re loss causation); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, No. 06-484 (U.S. *cert*. granted Jan. 5, 2007) (re heightened pleading requirements). In a joint statement, managers from the House and Senate declared that "Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets." H.R. Conf. Rep. 104-369, at 31. The managers observed that plaintiffs routinely were filing lawsuits "against issuers of securities and others whenever there [was] a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action[.]" *Id*. They recognized that plaintiffs, by targeting "deep pocket defendants," could misuse the discovery process "to impose costs so burdensome that it [was] often economical for the victimized party to settle[.]" *Id*.

When some members of the plaintiffs' bar attempted to avoid the Reform Act by filing securities suits in state rather than federal courts, Congress enacted SLUSA. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 125 S. Ct. 1503, 1511 (2006). It provides that no "covered class action" based on state law and alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" "may be maintained in any State or Federal court by any private party." 15 U.S.C. § 78bb(f)(1)(A).

If this Court were to allow this antitrust suit to go forward, it will have effectively abrogated Congress' explicit protections afforded to public companies under the Reform Act and SLUSA.

III. APPLYING THE ANTITRUST LAWS HERE WOULD RESULT IN OVERREGULATION AND OVERDETERRENCE IN THE U.S. CAPITAL FORMATION PROCESS.

Congress has instructed that whenever the SEC engages in rulemaking pursuant to "the public interest," the Commission "shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b). Congress charged the Commission with the responsibility of balancing these potentially conflicting goals. The Second Circuit's decision threatens to undermine the Commission's balancing duties by permitting the potential for treble damages to impede conduct regulated by the Commission in the capital formation process.

The danger of this approach is "overdeterrence, *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) (internal quotations omitted). *See also* Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 629 (2003) ("treble damages ... makes no sense when applied to public acts where efficiencies and anticompetitive effects have to be weighed against each other before antitrust legality can be known"). As the Commission notes, Respondents' position "threatens the syndicate offering system because mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants." SEC Brief, Pet. App. at 155a. *See also id.* at 193a-194a (Commission noting that "fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process").

A. Antitrust Regulation Would Improperly Hinder The Ability Of U.S. Equity Capital Markets To Compete With Foreign Markets.

Any threat to the proper functioning of U.S. equity capital markets must be taken most seriously, since such markets constitute "the principal vehicle through which companies raise and price their capital." Interim Report of the Committee on Capital Markets Regulation, at x (2006). The threat comes at a time when the United States is at an increasingly competitive disadvantage compared to its foreign counterparts with respect to capital-raising activities. For example, the United States' share of global IPOs (*i.e.*, IPOs done outside a company's home country) in terms of value declined from 50 percent in 2000 to five percent in 2005. *Id.* ("Measured by number of IPOs, the decline is from 37 percent in 2000 to 10 percent in 2005."). Other estimates indicate that in 2000, nine out of every ten dollars raised by foreign companies were raised in the U.S., whereas in 2005, the reverse held true. *See* Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006). Some have even expressed concern that London will eventually displace New York as the world's financial capital. *See* Charles E. Schumer and Michael R. Bloomberg, *To Save New York, Learn From London*, Wall St. J., at A18 (Nov. 1, 2006) (in 2005, only one of the top 24 IPOs was registered in the U.S.). *See also* Karmin and Luchetti, *supra*, at C1 ("In 2005, 13 companies priced new stock offerings in New York ... [b]y contrast, in London and Luxembourg, 48 companies sold their new shares …").

The precipitous decline in the U.S.'s share of global capital-raising activities is principally attributable to the burdensome regulatory requirements and costly litigation encountered in the U.S. market. Concern about U.S. overregulation is particularly prevalent among companies based in important growing and emerging markets. *See* Michelle Tsai and Lynn Cowan, *IPO Outlook: Chinese IPOs Stick Close to Home – Not Many Firms Make Debut in U.S. Amid Lawsuit Fears, Costs, Strict Regulation*, Wall St. J., at C4 (Mar. 20. 2006) ("Even with China's expanding economy, [investors] aren't seeing many new Chinese stocks listing on U.S. exchanges, and the ones that do are small fry compared with what trades in Hong Kong."). Over the last two years, U.S. stock exchanges have already experienced a decline in profitable and attractive Chinese investments. *See* *id*. ("Since 2004, when 10 U.S.-listed Chinese IPOs raised a total of $3.93 billion, both the number and size of listings have declined …"). As SEC Commissioner Paul Atkins notes, "[l]itigation risks and burdensome regulations ... lessen the international appetite for our capital markets." Paul Atkins, *A Serious Threat to Our Capital Markets,* Wall St. J. (June 10, 2006). Foreign companies have recognized that litigation in the U.S. is "more intrusive, more time consuming, and more costly than litigation in other countries." Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. REV. 523, 531 (Winter 1993). Indeed, from 1997 to 2005, U.S. securities class actions jumped in value from $150 million to $9.6 billion. *See* Schumer, *supra,* at A18.[6]

The Second Circuit's decision, if upheld, would impose an even further drag on U.S. equity capital markets by adding antitrust suits to an already burdensome regulatory and litigation environment. Unlike securities suits, antitrust claims raise the potential for treble-damage recovery and are less susceptible to early dismissal relative to securities actions because plaintiffs are not subjected to the Reform Act's heightened pleading requirements and other provisions designed to prevent abusive litigation. *See* Richard Liebeskind, Bryan R. Dunlap & Gena Chieco, *SEC, Antitrust Division May Square Off Over Jurisdiction*, Mondaq, at *1 (Aug. 3, 2006). The specter of treble damages will force market participants to "focus on avoiding antitrust liability, as opposed to a more constructive focus on complying with securities laws." *Id*.; *see also* Atkins, *supra* (noting that antitrust class actions would mire a U.S. system focused on delivering "IPOs efficiently and effectively to the market"). This in turn increases the costs of capital; the likely result

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[6] As noted above, more than 300 consolidated actions have been filed under the securities laws concerning the conduct alleged here. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006).

will be fewer IPOs with some IPOs not occurring at all. *See* Brief of Securities Industry Association, Chamber of Commerce of the United States of America, and the Bond Market Association as Amici Curiae in Support of Petition for Certiorari, at 17 (April 2006). Importantly, the ultimate cost is to investors and reflects the very antithesis of antitrust law – *i.e.*, fewer investors will have the opportunity to receive shares. *Id.*[7]

B. The SEC, As An Active And Robust Regulatory Agency, Is Best Suited To Regulate The U.S. Capital Formation Process.

The Second Circuit's decision fails to adequately consider the costs and benefits of imposing antitrust regulation over capital formation activities. The Second Circuit effectively permits a lay jury to usurp the Commission's duty to regulate the capital formation process. This not only conflicts with the Commission's congressional mandate, but eviscerates the value inherent in a regulatory agency with substantial institutional experience and expertise in securities regulation. While the Commission draws on its experiences over time to carefully tailor enforcement objectives and remedies, the antitrust law's single-minded focus on competition and the prospect for treble damages can lead to confusion and market disruption. *See* Atkins, *supra*

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[7] Further, the scope of parties adversely affected by the Second Circuit's decision would extend beyond the members of the syndicate. *See id.* at 3 n.2 ("American firms raise capital as well through public offerings of debt and of equity subsequent to the IPO .... The effect of the panel's decision therefore will not be limited to IPOs but will extend to many other securities offerings."). *See also* Karmin and Lucchetti, *supra*, at C1 (the attractiveness of foreign capital markets "could mean that European individual investors have greater opportunities to invest directly in the best foreign companies of the future, whereas U.S. individual investors have fewer chances to do so").

("An awkward antitrust overlay could disable the … finely tuned regulatory framework [of the Commission]."). As one prominent antitrust scholar put it:

> Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another as well. The agency, by contrast, can generally be expected to make and enforce its own mandates consistently. In all events, the issue is not whether the agency has actually passed judgment on the practice, but whether it is competent to do so and likely to do so if asked. In virtually all such cases the regulatory agency has the clear comparative advantage over a court of general jurisdiction ....

Hovenkamp, *supra*, at 629 (2003). As the D.C. Circuit has held, "the tendency in antitrust adjudication to view business relationships in the black and white terms of legality or illegality, based solely on their competitive or anticompetitive impact, has no place" in evaluating SEC decisions. *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978).

Where, as here, a robust – and active – regulatory regime exists to address the conduct at issue, the value in exposing parties to antitrust liability is even harder to justify. The Commission has already stated that the challenged practices "fall within the very heart of the Commission's regulatory authority over underwriting syndicates ... and they are comprehensively regulated." SEC Brief, Pet. App. at 127a. The Commission is also "actively pursuing comprehensive regulatory responses to those concerns, including possible enforcement actions and rulemaking." *Id.* at 128a. In this context, the questions are two-fold:

> First, how well is the regulatory enterprise itself doing its job of identifying and controlling competitive harms. Second, how much confidence do we have that application of the antitrust laws will improve competition in the situation at hand.

Herbert Hovencamp, THE ANTITRUST ENTERPRISE, at 237 (2005). As discussed above, *see supra*, at Section II, the Commission not only has the authority to address the underlying conduct at issue here, but must consider the competitive effects in crafting regulatory responses thereto. Further, far from standing idly by, the Commission is "actively" executing its statutory duties with respect to the underwriting practices that respondents challenge. As in *Trinko*, 540 U.S. at 411-15, this Court should conclude that the Commission is "an effective steward of the antitrust function" and that exposure to antitrust liability would not provide benefits sufficient to outweigh the potential detriment to the proper functioning and competitiveness of U.S. capital markets.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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