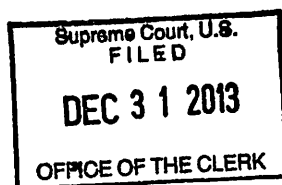


13-878

No. _____



IN THE
Supreme Court of the United States

MICHAEL BOGART

Petitioner,

v.

OLIVIER FAMILY INTERESTS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. No person may be found liable on a cause of action that does not exist in the statutes. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Section 107 of PSLRA amended the civil RICO statute by barring securities-fraud-based RICO causes of action. Because trial counsel failed to raise any PSLRA objections, the Eighth Circuit affirmed the district court's \$12.9 million judgment entered on a RICO complaint that also charged securities fraud.

Question 1: Can a civil judgment stand if it was entered on a non-existent cause of action simply as a result of trial counsel's failure to alert the tribunal as to the fact that the cause of action is not one cognizable under federal law?

2. A substantive statutory violation that requires some predicate act may not legally be complete if the underlying act committed is not recognized as an eligible predicate for the substantive offense by that statute. *Scheidler v. National Organization for Women*, 547 U.S. 9, 20 (2006). In line with PSLRA, any predicate act connected with fraud in the sale or purchase of securities has been specifically excluded from the statutory listing of predicate acts for RICO. Because of trial counsel's deficient performance, petitioner Michael Bogart was found liable on the RICO count, even though the predicate acts were inextricably connected to the securities fraud alleged.

Question 2: Is a RICO judgment grounded in the type of conduct that the statute specifically excluded from the list of eligible predicates

immune from challenges on appeal by the mere virtue of trial counsel's failure to preserve an objection?

3. Section 1964(c) of U.S. Code Title 18 vests trial courts across the United States with jurisdiction to try civil RICO claims. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). PSLRA amended the one-sentence jurisdiction-vesting provision in Section 1964(c) to exclude from the coverage range of civil RICO any conduct actionable as fraud in the sale or purchase of securities. Bogart's counsel failed to object to the propriety of trying his client for securities-fraud-based RICO, and a judgment was entered against him.

Question 3: Does the constraint that PSLRA imposed on civil RICO with respect to prohibiting claims based on securities fraud constitute a limitation on the federal court's jurisdiction under Section 1964(c)?

LIST OF PARTIES

Before this court is petitioner Michael Bogart, who challenges a decision in favor of respondent Olivier Family Interests (“OFI”). The parties below are included in the caption of the Third Amended Complaint, Appendix “D” hereto. Of all the parties, only Michael Bogart is filing a Petition for a Writ of *Certiorari*.

CORPORATE DISCLOSURE STATEMENT

GBS International, LLC (“GBS”), now dissolved, was a limited liability company established under the laws of the state of Wyoming on March 27, 2006. The company operated in Missouri. The business-entity did not have a parent corporation, and there were no publicly-held corporations owning 10 percent of its stock.

OFI is a limited partnership organized and existing under the laws of the state of Texas. OFI and its general partner Olivier Management Company, LLC (“OMC”), have their principal office in Montgomery County, Texas. On information and belief, the business-entity respondent does not have parent a corporation, and there are no publicly-held corporations owning 10 percent of its stock.

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The order of the United States Court of Appeals for the Eighth Circuit denying the Petition for Rehearing and Rehearing *En Banc* entered on October 2, 2013 is reproduced at
Appendix “A.” A-1

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit dated and entered August 27, 2013 is reproduced at
Appendix “B.” A-2

The judgment of the United States District Court for the Western District of Missouri entered on May 30, 2012 is reproduced at Appendix “C.” A-7

Relevant excerpts from respondent OFI’s Third Amended Complaint, containing two mutually-exclusive RICO and Securities Act causes of action, is reproduced at Appendix “D.” A-12

OPINIONS BELOW

On May 30, 2012, a civil RICO judgment in the amount of \$12.9 million was entered against Bogart and other co-defendants following a jury trial in the U.S. District Court for the Western District of Missouri at Springfield. On June 29, 2012, Bogart timely appealed to the Court of Appeals for the Eighth Circuit. A three-judge panel of the Eighth Circuit issued a *per curiam* decision to affirm the judgment on the RICO count on August 27, 2013. The citation to the unpublished opinion is *Olivier Family Interests, Ltd. v. Wright*, 527 Fed. Appx. 596 (8th Cir. 2013). On September 10, 2013, Bogart filed a Petition for Rehearing and Rehearing *En Banc* in the Eighth Circuit. That petition was denied on October 2, 2013.

JURISDICTION

Final judgment was entered on May 30, 2012. The judgment was affirmed by the Eighth Circuit Court of Appeals in a decision entered on August 27, 2013. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the entry of the Eighth Circuit's order denying rehearing *en banc*, which was entered on October 2, 2013. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is Section 107 of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, Dec. 22, 1995. The full

text of the provision, now codified at 18 U.S.C. § 1964(c), reads as follows:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

This case arises out of petitioner Michael Bogart's introduction of Lorie Olivier, the real party in interest in respondent OFI, to now-deceased¹ Russel Wright, an inventor-businessman from Springfield, Missouri, in the fall of 2005. Wright was a principal in a construction company that utilized proprietary Stoam panel technology. After Olivier met Wright, he purchased an international license to the Stoam technology for \$3 million. Next, Wright, Olivier, and Bogart formed GBS, a limited liability company, whose purpose was to commercialize the Stoam technology internationally. As his contribution to GBS, Olivier provided to the newly-created company the Stoam international license he had just bought. Pursuant to a separate contribution agreement, Olivier was to advance additional funds to GBS in the amount of \$7 million. In line with the same contribution agreement, Bogart and Wright were each to make \$10 million in sales for GBS within 18 months following the formation of the company in March 2006. Over the course of approximately six months, OFI tendered to GBS in the form of loans close to \$3.5 million of the \$7 million specified in the contribution agreement. Then, Olivier abruptly cut off the funding for GBS, and the whole venture folded.

In the six months of GBS's operation, Bogart made exhaustive international efforts to sell

¹ Russel Wright died unexpectedly under mysterious circumstances in an out-of-state hotel room while traveling during the pendency of the appeal before the Eighth Circuit.

Stoam licenses for GBS, traveling to Russia, Antigua, Brazil, the Dominican Republic, England, Israel, and Spain. He conducted business negotiations with possible clients from Azerbaijan. Even though nominally appointed to GBS's dormant "executive committee," Bogart was not involved in the management of the business. In the six months that the venture operated, the funds Olivier supplied to GBS were used by Wright's domestic Stoam entity to sustain daily operations. The domestic Stoam entity was kept running as a showroom for GBS's foreign clients, who were invited to visit the production site in Springfield, Missouri in advance of their commitments to purchase the technology.

After the venture dissolved, Olivier, acting through OFI, sued nearly every single person involved in his business transaction with Stoam, including the company's employees. The principal defendants were Wright and Bogart. The jury trial in the case lasted from May 14 to May 23, 2012. At the conclusion of proceedings in the district court, a consolidated judgment against the defendants was entered in the amount of \$12.9 million dollars on the RICO count.

INTRODUCTION

This Court held in 2006 that a plaintiff may not establish a RICO violation by relying on a predicate act that was legally impossible to commit. As such, the ruling in *Scheidler v. National Organization for Women*, 547 U.S. 9, 20 (2006), stands for the proposition that a ground not enumerated in the statute cannot serve as a predicate act for an offense

charged in a RICO action. Physical violence, excluded as it is from the predicate acts of 18 U.S.C. § 1951, may not give rise to liability under the Hobbs Act and may not then be used as a basis for RICO. The case of Michael Bogart bears significant resemblance to *Scheidler* not only because both involve civil RICO, but also – and more importantly – because the lower court in Bogart’s case found liability for RICO that was grounded in a Securities Act violation that is specifically excluded from RICO’s predicate acts. To be sure, RICO’s PSLRA amendment imposes a prohibition on using any securities-related violations as bases for establishing RICO. Seldom does a case of this magnitude reach the Court after many years of wasteful litigation with ineffective defense counsel, who failed to spot the obvious PSLRA issue. Nonetheless, Bogart’s case presents a legal issue of major impact in an area of substantial commercial interest on which there is a deep split of authority: is PSLRA a jurisdictional limitation on civil RICO, or is it merely a waivable procedural rule that can be circumvented or given up? Consistent with Congressional intent, as well as plain statutory language and prior decisions, this Court should grant the foregoing petition and reverse the judgment.

RICO was enacted in 1970 as part of an effort to fight organized crime. Its “major purpose” was “to attack the infiltration of organized crime and racketeering into legitimate organizations.” *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (citation and quotation marks omitted). The invocation of RICO by the civil plaintiff in this commercial dispute did violence to the original purpose of RICO, inasmuch as the claim for treble damages was

leveled against a respected and legitimate enterprise² and a man of great personal integrity Michael Bogart. While RICO was intended as a means of eradicating organized crime, see Organized Crime Control Act of 1970, 84 Stat. 922, 923, and PSLRA was meant to ensure that RICO's purpose does not get subverted to hurt legitimate commercial entities, all these elaborate statutory safeguards failed in this case because of clear omissions by defendant's counsel. In the end, Bogart, one of the few people that actually tried to generate million-dollar sales for the company, got branded as a "racketeer."

SUMMARY OF THE ARGUMENT

The Court should grant this Petition for a Writ of *Certiorari* because the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The Eighth Circuit sustained a \$12.9 judgment against Bogart for securities-fraud-based RICO, a cause of action that no longer exists ever since it was abrogated by PSLRA. First and foremost, in line with this Court's jurisprudence, a person may not be found liable on a cause of action that Congress has not created by statute. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In the instant case, Bogart's trial attorney failed to challenge respondent OFT's assertion of the RICO count on the ground that it was improperly brought where the underlying conduct involved the violation of securities laws. Neither the trial counsel

² The Stoam construction company was featured on the Extreme Home Makeover show and built homes in Missouri for a charitable organization.

nor the trial judge found anything odd with respondent's complaint, which charged both RICO and securities fraud one after another. Rarely is it that easy to identify a securities litigation brought in the guise of RICO. Clearly, OFI was oblivious as to the incompatibility of RICO and securities fraud, both of which respondent alleged. Yet, presented with this viable PSLRA challenge to OFI's securities-based RICO judgment, the Eighth Circuit decided to shirk the whole issue. The Court of Appeals ratified respondent's multi-million dollar judgment on a non-existent cause of action, opting to foreclose review on a legal technicality – the fact that deficient trial counsel failed to preserve the PSLRA argument. At the same time, in view of the weight of legislative history, as well as the national scope of debate as to the perils of untamed RICO, it is clear that PSLRA's reform of civil RICO was implemented so as not to be given up lightly. A court may not award damages on a non-cognizable cause of action simply because the defendant failed to advise the judge that the counts charged warrant no remedy at law. This Court should grant the writ and reverse the judgment against Bogart because the purported violation for which he was found liable is nowhere to be found in the United States Code.

Second, the writ should issue because the Eighth Circuit entered a decision that is inconsistent with this Court's jurisprudence. This Court established that if an offense is based on one's commission of a statutorily-specified predicate act, no other predicate act may be used instead. *Scheidler*, 547 U.S. 9, 20 (2006). This Court arrived at this principle by considering the merits of an analogous challenge to the predicates of the Hobbs Act – all despite the fact

that the parties never raised the arguments in the trial court. In the context of post-PSLRA RICO, the statute simply may not be construed to include among its predicates the violation of securities laws. This is so because the statute expressly prohibits using securities fraud as a predicate act. The fact that the statute specifies only one exception to the bright-line rule – that is a criminal conviction for securities fraud – also speaks a great deal of Congress's desire to limit RICO exposure to only true organized criminals. Neither waiver, nor estoppel, nor any equitable ground is included in the statute as an exception.

Last but not least, in refusing to recognize the PSLRA amendment limiting effect on federal court jurisdiction for civil RICO claims, the Eighth Circuit's decision disregarded the guidance of this Court and further perpetuated deep inter-circuit rivalries in securities litigation. In that regard, this Court should acknowledge that the PSLRA amendment is not only a limitation on available remedies or the predicate acts that could be used to establish RICO, but also that it constitutes a jurisdictional constraint for both federal and state courts to try securities cases dressed up in the guise of RICO. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

ARGUMENT

I. THIS COURT'S PRECEDENTS PROHIBIT FASHIONING A PRIVATE CAUSE OF ACTION THAT CONGRESS HAS NOT AUTHORIZED BY STATUTE.

A. A finding of liability on a non-existent cause of action is void.

The Supreme Court should grant this Petition for a Writ of *Certiorari* because respondent Michael Bogart was found liable on a non-existent cause of action. The weight of Supreme Court precedent for the past half a century is clear that a defendant may not be adjudged liable of a non-existent tort: that is, conduct which is not sanctionable within the jurisdiction in which it is committed. Absent a narrow category of exceptions, the federal judiciary has no power to accord damages as a remedy in the absence of a statutory authorization of a federal cause of action. *Albright v. Oliver*, 510 U.S. 266, 315 (1994). In the case at bar, a multi-million-dollar judgment was entered against Bogart on a securities-fraud-based RICO, a cause of action that does not exist. The RICO judgment is improper because PSLRA prohibited using securities fraud as a predicate act in establishing liability under RICO. It is now settled that unless Congress intends to create a cause of action, “a cause of action does not exist, and courts may not create one.” *Sandoval*, 532 U.S. 275, 286-87 (2001). In no uncertain terms, this Court explained that it long ago “abandoned” the view that the federal courts’ role is to attempt to improve

statutory schemes by creating remedies that Congress did not provide. *Id.*, at 287. Subject to the PSLRA amendment, the RICO statute at issue here does not create a private right of action allowing plaintiffs to recover anything if the underlying conduct would have been actionable as securities fraud.

In case after case, this Court has held that judge-made remedies are not appropriate where the statute provides no cause of action. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004); *Sandoval*, 532 U.S. 275, 287-88 (2001); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). That should have been the end of the analysis in the Eighth Circuit Court of Appeals when the undersigned first raised PSLRA's prohibition on using securities fraud for RICO. Instead, the Eighth Circuit's decision entirely brushed aside petitioner's PSLRA argument, cursorily concluding that "the possible applicability of PSLRA to this case is not a purely legal question" and that "the court will consider a newly-raised argument only if it is purely legal and requires no additional factual development." *Family Interests, Ltd. v. Wright*, 527 Fed. Appx. 596, 598 (8th Cir. 2013). Not only was the appellate court's hasty conclusion inaccurate inasmuch as OFI's complaint included securities fraud together with RICO – requiring no extra factual development to establish PSLRA's applicability, – but also the panel's decision essentially reverted to an antiquated understanding of private remedies and causes of action. Is it possible through waiver, agreement of the parties, or

the court's inference of some unspecified private right of action to litigate in the federal forum causes of action not provided for statutorily, or for that matter expressly prohibited by statute? This Court has rebuffed any such efforts, stating that the "ultimate issue" is whether Congress created the asserted right or remedy. *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Nw. Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91 (1981). Altogether, instead of making rulings as to what remedies are appropriate at a given procedural posture, federal courts now must limit themselves to ascertaining what remedies Congress created. *See Sandoval*, 532 U.S. 275, 286 (2001). Absent Congressional intent to create a right as well as a remedy, no cause of action may be fashioned "no matter how desirable that might be as a policy matter. . . ." *Id.*, at 286-87. Here, members of the panel of the Eighth Circuit closed their eyes to the fact that OFI's stated cause of action was precluded under PSLRA – all on the mistaken impression that the record below was somehow underdeveloped. Reversal here is required.

B. PSLRA applies to OFI's claims because the conduct complained of was actionable as securities fraud. OFI's original petition and the amended civil complaints in this litigation listed a Securities Act violation as a cause of action.

Contrary to the spurious justification the Eighth Circuit used to skirt the issue of Bogart's liability on

a non-existent cause of action, the record below was well-developed as to whether the conduct complained of could be used to establish a violation under securities laws. While defining and categorizing conduct as securities or non-securities fraud is difficult, especially with respect to a complex and multifaceted transaction, in the case at bar, it is easy to determine that the conduct OFI used as a predicate act for the RICO count was actionable as a violation of securities laws. In effect, one does not have to go far to ascertain that respondent's very complaints filed in the district court – both the original and the many successive amended complaints – contained causes of action for securities fraud. *See* pp. A-21-22. In the post-PSLRA era, this case is one of those rare varieties where a defendant's purported conduct was not merely "actionable" as a securities violation, but also charged as such in the very instrument alleging RICO. Normally, to constitute conduct "actionable as fraud in the purchase or sale of securities," the alleged fraud only needs to be "in connection with the purchase or sale of securities." *SEC v. Zandford*, 535 U.S. 813, 820, (2002). The Supreme Court in *Zandford* explained that fraudulent conduct is "in connection with" the purchase or sale of securities when that alleged fraud "coincides" with securities transactions and the events are "not independent." *Id.*, at 820, 822, 824. In this matter, OFI's own allegations reveal that its civil racketeering claim falls squarely within the purview of PSLRA's bar on RICO actions. The complaint filed in the case similarly asserted that the case was brought as a Securities Act violation. In fact, OFI in its complaint pleaded two mutually-exclusive remedies under federal laws in the same sentence. *See* p. A-14. The

actions of Wright and Bogart, which formed the factual basis of OFI's complaint, are that respondent and other co-defendants participated in an interstate Ponzi scheme. The allegations advanced at trial specifically set forth the purported fraudulent actions of Bogart, Wright, and the remaining defendants as the basis for relief. There is no doubt from OFI's allegations that the claims concerned a fraudulent transaction of securities. In his summation, OFI's attorney likened Wright's and Bogart's business to such schemes as Enron and the charade of companies that Bernie Madoff orchestrated. While the inclusion of securities fraud as the chief aspect of the case and the re-casting of Wright's and Bogart's activities as Ponzi schemes certainly increased – to borrow the jargon of OFI's counsel – the “sex appeal” of the story to the jury, such legal theories made the RICO cause of action incompatible with the allegations in the complaint as a matter of law.

The Eighth Circuit panel's refusal to address the question as to whether PSLRA precluded the assertion of a RICO cause of action against Bogart was nearsighted. The panel's decision noted that the Court could consider a newly-raised argument only if it is purely legal and requires no additional factual development. The panel then concluded that the applicability of PSLRA to this case was not a purely legal question. Contrary to the panel's decision, the only question that must be addressed here is legal. There is no serious issue as to whether OFI's RICO claim could have also been raised as a securities claim. It was duplicitous for OFI to contend in its appellate materials that the claims it brought under the guise of RICO were not connected with sales and purchases of securities. In this case, it is clear that

no factual issues need be decided to determine whether OFI could have initially brought a securities-based RICO claim. OFI's original complaint, its pre-trial submissions, as well as its arguments at trial are replete with allegations of petitioner's violations of the Securities Act. Thus, the question of whether the action could have been brought as a securities case is a legal question that should be answered in the affirmative because the litigation was indeed commenced as a securities-fraud-based action. A plaintiff's inclusion of a certain cause of action in the complaint coupled with that party's efforts to advocate the asserted theory of recovery through litigation makes the issue of whether the case indeed implicates the stated legal ground a question of law. For example, it is a rule in making decisions on case consolidation or class certification that the issue of the similarity of the stated causes of action asserted in different complaints is a legal matter to be addressed by the court. *See Consolidation*, 29A Fed. Proc., L. Ed. § 70:400 (2013); *see also Class Actions*, 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed.) (2013). In all, OFI's RICO claim against Bogart was barred from the very beginning, and the appellate court erred in not disturbing the judgment entered.

C. By construing PSLRA's bar on RICO as a waivable defense, the appellate court circumvented the only statutory exception that the amendment left open.

The Eighth Circuit's affirmance and legitimization of respondent OFI's judgment against Bogart on the RICO count involving securities fraud impermissibly broadened the one statutory exception contained in the PSLRA amendment authorizing civil actions for claims involving securities fraud. Before PSLRA, securities fraud frequently served as the predicate of many RICO claims. In 1995, PSLRA limited private suit liability for securities violations under RICO to those criminally convicted in connection with securities fraud. In fact, Section 107 of PSLRA is explicit as to the fact that a defendant's criminal conviction for securities fraud is the only exception to anchoring a RICO claim on an otherwise non-actionable securities-fraud violation. As such, situations where defendants are criminally convicted for securities violations constitute the only instances where securities-based RICO becomes a federally-cognizable cause of action. The statutes' silence as to any other possible grounds warranting different exceptions is indicative of Congressional intent to enshrine PSLRA's prohibition on securities-based civil RICO as one hard bright line rule with no deviations allowed. Of particular note is the statute's non-inclusion of such exceptions as waiver, estoppel, or the failure to exhaust affirmative defenses in the lower courts. From the standpoint of the United States Code, the fact that Bogart's incompetent trial counsel failed to challenge OFI's complaint on the basis of PSLRA did nothing to render the securities-

based RICO claim all of the sudden cognizable under federal law.

If anything, the criminal conviction exception to PSLRA's prohibition on RICO causes of action grounded in violations of the Securities Act can serve as a benchmark for the level of a potential defendant's culpability in having wrought upon himself the wrath of both civil and criminal racketeering and securities fraud prosecutions. It goes without saying that a person against whom a federal court has entered a conviction for fraud is substantially more blameworthy than one who merely happened to be an intermediary in a business deal and who was sued civilly. Besides, in this case, Bogart failed to raise the PSLRA issue through no fault of his own, but because of the omissions of his attorney. If a conviction and sentence is to be taken as the benchmark for exposure to liability for securities-based civil RICO, Bogart is far short of meriting the disfavor of becoming subject to the statutory exception. In that regard, the appellate court's refusal to consider Bogart's arguments resulted in the affirmance of a \$12.9 million judgment entered on a cause of action that does not exist – all in circumvention of the only exception that the amended statute carved out.

**II. WHEN READ TOGETHER WITH THE
PSLRA AMENDMENT, THE RICO
STATUTE CANNOT BE CONSTRUED TO
REACH CONDUCT ACTIONABLE AS
SECURITIES FRAUD UNDER ANY
CIRCUMSTANCES.**

- A. The Supreme Court has held that an offense requiring the commission of a certain predicate act cannot be committed through some other predicate act not provided for under the statute.**

In the United States Code, there are a number of statutes that require the commission of certain predicate acts for establishing a substantive violation of a particular enactment. Besides RICO, some of the substantive violations that cannot be accomplished without committing a predicate act include the Hobbs Act, 18 U.S.C. § 1951, the Travel Act, 18 U.S.C. § 1952, the Violent Crimes in Aid of Racketeering Activity Act, 18 U.S.C. § 1959, the Securities Exchange Act, 15 U.S.C. § 78j(b), and the Continuing Criminal Enterprise Act, 21 U.S.C. § 848(a). The fabric of these offenses is inextricably interwoven with their predicate acts. If the act committed is unlisted in the statute or if it is expressly excluded from the listing of predicate acts for a given offense, the commission of the substantive offense becomes impossible. Thus, the substantive RICO violation can never be divorced from the limitations imposed on its predicate acts.

- (1) If a statutorily-prohibited predicate act is used to establish a substantive violation, this Court would be within its right to declare the reliance on such a predicate act unlawful.**

The Court should grant this writ because Bogart challenges the finding of liability made and affirmed in conscious disregard as to the legal impossibility of using securities fraud as a predicate for a civil RICO violation. Invalidating the application of a predicate-based statute on the ground that the predicate is unmentioned in the listing of acts giving rise to liability for the particular violation is not without recent precedent in the Supreme Court. In *Scheidler*, 547 U.S. 9 (2006), a civil RICO case, this Court held that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act, 18 U.S.C. § 1951. As such, while civil liability under the Hobbs Act used in conjunction with RICO could be found if the predicate act was robbery or extortion, no liability arose if the act was merely physical violence. *Scheidler, supra*. The Court reached this conclusion by looking at the statutory language, which did not include physical violence in the enumeration of eligible predicate acts. In the matter at hand, much like the plaintiff in *Scheidler*, respondent OFI claimed during the trial that Bogart committed a RICO violation by means of perpetrating – *inter alia* – securities fraud, which was expressly excluded from the list of RICO's many predicate acts. The Supreme Court should overturn the Eighth Circuit's affirmance of the RICO judgment because the predicate act of securities fraud charged against Bogart rendered the

adjudication of his liability on the substantive RICO count invalid.

(2) In assessing an appellate decision sanctioning the use of a prohibited predicate act to ground a substantive claim, the Court should not be concerned as to whether the legal arguments the circuit court considered were exhausted in the district court.

For purposes of this Court's analysis, it bears no significance that Bogart's trial counsel neglected to move before the district court for the dismissal of the complaint based on PSLRA's blanket prohibition on securities-fraud RICO. It would suffice to look at the procedural posture of *Scheidler* to arrive at that conclusion. In that case, respondents based their legal claims upon the Hobbs Act and RICO, claiming that petitioners' clinic-related protest activities amounted to extortion. *Scheidler*, 547 U.S. 9, 14 (2006). They added that these extortionate acts created a pattern of racketeering activity and sought a permanent injunction. *Id.* The case went all the way to the Supreme Court three times, one remand after another. At trial, the jury found that petitioners had engaged in a host of extortionate acts and awarded treble damages. *Id.*, at 15. The district court entered a nationwide injunction, and the Seventh Circuit affirmed. *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). The Supreme Court again reversed. *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003). *Id.*, at 400. On remand, the Court of Appeals did not order the District Court to terminate the

cases or to vacate its injunction. *Scheidler*, 547 U.S. 9, 16 (2006). Instead, the Court of Appeals considered respondents' newly-raised argument that the jury's RICO verdict rested not only upon many instances of extortion-related conduct, but also upon four instances (or threats) of physical violence unrelated to extortion. *Scheidler v. National Organization for Women, Inc.*, 91 Fed. Appx. 510, 512 (7th Cir. 2004). Because the Court of Appeals decided that the parties had not presented this theory to the Supreme Court, it remanded the case to the district court to make that determination. Subsequently, petitioners sought *certiorari* to review that ruling, and the Supreme Court vacated the decision. *Scheidler*, 547 U.S. 9, 16 (2006). What is important here for Bogart's case is that this Court considered the merits of an appellate ruling as to the applicability of a particular predicate act in establishing a substantive violation – all in the absence of the parties' ever having raised the possible application of the predicate act to the substantive offense before the district court. As such, respondents in *Scheidler* raised the violence predicate for the first time before the Seventh Circuit after the second remand from the Supreme Court. Instead of using some procedural rule to reject the newly-raised claim amidst a lengthy appellate litigation, the Seventh Circuit decided to remand the case. Confronted with that decision, this Court proceeded to adjudicate the merits of relying on an unlisted predicate act to establish a violation of the Hobbs Act. In Bogart's case too, even though the question of whether the statutorily proscribed securities-fraud predicate can be used in establishing a RICO violation was never addressed by the trial court, this Court should not feel itself constrained to adjudicate the merits of Bogart's PSLRA argument.

B. The interpretation of PSLRA's bar as a procedural rule that may be waived at some point in the litigation cannot be reconciled with RICO's language.

This Court should issue the writ because the Eighth Circuit substituted its unreasonable construction of the statute for clear statutory text insofar as it relates to a plaintiff's ability to bootstrap civil RICO to securities fraud absent timely objections. What the PSLRA amendment does is it prohibits the use of securities-fraud-related conduct as a predicate act for a RICO violation. Section 1964(c) leaves no room to equivocate. It is precise in that "no person" (emphasis added) may rely upon "any conduct" actionable as a securities violation to establish civil RICO. The statute does not spell out at what stage of the litigation a challenge to a securities-based RICO complaint may be made to preclude a claim because it can be made at any time. As such, Section 1964(c) applies broadly to any litigation brought by any person for any reason, no "ifs," "ands," or "buts."

The plain language of 18 U.S.C. § 1964(c) cannot sustain the perfunctory construction of that enactment that the Eighth Circuit now espouses. In *Popp Telecom, Inc. v. Am. Sharecom*, 361 F.3d 482 (8th Cir. 2004), the Eighth Circuit concluded that PSLRA is merely a procedural rule regulating the filing of a RICO claim. *Id.*, at 489. The appellate court's relegation of the amendment's significance to a lowly house-keeping status is bound to result in a strained and extra-textual reading of the RICO statute. In particular, to indulge the appellate court's

theory, the “except that” clause would need to be supplemented by a yet another conditional clause “unless defendant fails to object to plaintiff’s reliance on such conduct in proceedings before the district court.” It is clear that if the lawmakers actually wanted to make PSLRA’s bar on RICO waivable, they could have easily included that language into the statutory text. Instead, Congress chose not to make the prohibition in any way contingent on the acts or omissions of the defendant. The “[n]o person” reference in the text of civil RICO clearly constrains the acts of only the plaintiff.

In line with the canons of statutory construction, the task of resolving the scope of Section 1964(c) is to start with the language of the statute itself.

Landreth Timber Co. v. Landreth 471 U.S. 681, 685 (1985). In relation to civil RICO, since “the statute’s language is plain, ‘the sole function of the courts,’ is ‘to enforce it according to its terms.’” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). It is axiomatic that Courts cannot re-write the plain and unambiguous text of a statute in interpreting an enactment.

C. The purpose, history, and legislative intent behind 18 U.S.C. § 1964(c) is at odds with the Court of Appeal’s easy acquiescence in a securities fraud RICO judgment.

The Eighth Circuit decision contradicts the intention of a federal law. The legislative history of

the PSLRA amendment is barren of any references to overcome the plain meaning of the post-PSLRA RICO statute. Quite to the contrary, it lends full support to the plain-language interpretation that the securities-fraud based prohibition on RICO litigation is not constrained by a particular defendant's failure to timely object.

Concerned with mass scale abuses of civil RICO, the United States Congress in a little more than the last decade and a half has not once, but twice undertaken serious efforts to preclude unmeritorious securities lawsuits. It first passed PSLRA and then SLUSA. Michael Serota, *(Mis)interpreting SLUSA: Closing the Jurisdictional Loophole in Federal Securities Class Actions*, 7 Berkeley Bus. L.J. 162 (2010). PSLRA was a response to substantial evidence of abusive litigation tactics. In particular, Congress concluded that civil RICO claims grounded on predicate acts of securities fraud had been used to duplicate and distort existing remedies under securities laws. A few excerpts from the statute's legislative history would be instructive for highlighting the obviousness of problems occasioned by securities-based RICO. First and foremost, Congressman Cox, the sponsor of PSLRA amendment, provided an informative account of problems with civil RICO:

[A]lmost everyone who has studied this issue recognizes that plaintiffs' attorneys have used the civil RICO statute to distort the incentives and remedies that the federal securities laws provide. They have done this by taking

advantage of a loophole in RICO that has permitted inclusion of securities law violations as a predicate act[,] for which a defendant may be tagged as a racketeer and held liable for treble damages and attorneys' fees. Additionally, because many claims that could be asserted as securities law claims can also be characterized as mail or wire fraud, and because mail and wire fraud are also predicates for civil RICO liability, plaintiffs' attorneys have a devastating potent and readily available alternative for bringing actions under RICO rather than under our securities laws.

141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995) (statement of Rep. Cox).

In his turn, Congressman Fields quoted Justice Thurgood Marshall's account of the abuses that securities-based RICO actions could lead to:

Many a prudent defendant, facing a ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils it was designed to combat.

141 Cong. Rec. H2775 (daily ed.
Mar. 7, 1995). (statement of Rep.
Fields).

A few months prior to the Congressional hearing cited, Securities and Exchange Commission Chairman Arthur Levitt, speaking in San Diego about the need for reform, said that “[m]ost parties ... concur that civil RICO charges in securities fraud cases, and their treble damages, should be prohibited.” *Between caveat emptor and caveat venditor: the middle ground of litigation reform*, Remarks by Chairman Arthur Levitt of the United States Securities and Exchange Commission at 22nd Annual Securities Regulation Institute, 1995 WL 361819 San Diego, Cal. (January 25, 1995).

The wealth of derogatory comments on the pernicious nature of unbridled securities-based civil RICO claims from officials in the legislative, the executive, and the judicial branches of the U.S. government is indicative of a widespread consensus to the effect that the practices PSLRA outlawed are unacceptable. As such, the rule imposing a bar on civil RICO is not some procedural ministerial device, the application of which can be waived if not timely raised. It is a universally-recognized bright-line rule that applies without limitations as to any particular procedural posture suitable for invoking its application. This case is a classic instance of the improper use of RICO that Congress sought to proscribe, as OFI’s RICO claim rests on conduct that it alleged was actionable as fraud in the purchase and sale of securities.

III. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE THE DISTRICT COURT LACKED JURISDICTION TO TRY A SECURITIES-FRAUD-BASED RICO ACTION.

A. The PSLRA amendment imposes a jurisdictional constraint.

The writ of *certiorari* should issue to resolve a question of outmost importance in securities litigation across the United States: “Is PSLRA’s bar on securities-fraud based civil RICO a jurisdictional limitation?” The decision of the Eighth Circuit is demonstrably in conflict with the Supreme Court’s earlier ruling characterizing Section 1964(c) in plainly jurisdictional terms. As such, in *Tafflin*, this Court recognized that Congress’s enactment of Section 1964(c) extended concurrent jurisdiction to try civil RICO cases to both federal and state courts. *See Tafflin*, 493 U.S. 455, 458 (1990). Therefore, an amendment to Section 1964(c) is quite literally addressed to the jurisdiction of the courts.

In addition to this plainly-stated formulation essentially to the effect that Section 1964(c) is the genesis for civil RICO jurisdiction, many other aspects of the post-PSLRA enactment lend support to construing the statute’s limitations on securities-based claims as jurisdictional constraints. Supreme Court case law offers guidance for distinguishing whether a legal norm is in fact jurisdictional or purely mandatory – *i.e.* in that it restricts the discretion of the court to deviate from the rule only when one party

timely objects.³ For purposes of determining whether a statute has jurisdictional effect, legal scholars have devised a framework with the following considerations based on relevant Supreme Court decisions: (1) whether Congress has specifically designated a provision as jurisdictional; (2) whether the function of the particular provision supports a jurisdictional characterization; (3) whether the effects of a jurisdictional characterization are consistent with the purpose and function of the provision; and (4) whether a jurisdictional characterization is doctrinally consistent as a matter of historical treatment and cross-doctrinally consistent with the characterization of similar provisions. Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. Rev. 55, 66 (2008). Based on the above factors, the Court should conclude that the PSLRA amendment is a jurisdictional limitation on the civil RICO claim.

(1) The text of the amendment is addressed to a jurisdictional limitation.

First, Congress's inclusion of PSLRA's limiting language in the very same sentence of 18 U.S.C. § 1964(c) that gives federal courts jurisdiction to try a cause of action charging civil RICO should raise a strong presumption of the amendment's jurisdictional character. The Supreme Court imposed rigorous "clear statement rules" on Congress in the context of legislation aimed at balancing state and

³ Compare *Bowles v. Russell*, 551 U.S. 205, 210 (2007); *Eberhart v. United States*, 546 U.S. 12, 17-20 (2005); *Becker v. Montgomery*, 532 U.S. 757, 767 (2001); *Foman v. Davis*, 371 U.S. 178, 180-81 (1962); *United States v. Robinson*, 361 U.S. 220, 224 (1960).

federal power. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In this case, Congress could hardly have been more specific in legislating that federal courts have no jurisdiction to try civil RICO cases where the underlying conduct is securities fraud. Reduced to basics, PSLRA modified the RICO statute to read as follows: “Anyone injured by a violation of section 1962 may sue for it in a federal court, except that nobody may use securities fraud to establish a violation of section 1962.” From a purely textualist point of view, in order to “sue” in federal court, a person first has to be injured by a “violation of section 1962.” The statute goes on to say that a person cannot establish a “violation of section 1962” based on securities fraud. Therefore, since there is no “violation of section 1962” in the securities fraud context, the person never acquires the right to sue for it in federal courts because he is never injured. To put it differently, the courts have no jurisdiction over that claim.

(2) A review of PSLRA’s purpose reflects its imposition of a jurisdictional limitation.

Second, in parsing the function prong of the overarching framework, this Court should evaluate the utility of the rule at issue. *Kontrick v. Ryan*, 540 U.S. 443, 451 (2004); *Eberhart v. United States*, 546 U.S. 12, 14 (2005). For one, it is important to determine whether the rule separates classes of cases, or merely relates to modes of proceedings. *Dodson, supra*, at *71. Secondly, it would be necessary to ascertain whether the rule is directed primarily at the power of the court and the underlying societal values. *Id.* In the PSLRA context, from the wealth of legislative history discussed

above, it is clear that the prohibition on bringing securities-based RICO claims protects societal interests and is not designed merely to smooth out the flow of litigation for the sole benefit of its participants. PSLRA speaks to the fundamental structural values undergirding a court's authority to exercise its powers. Moreover, it is clear that the trial court cannot deviate from PSLRA's prohibitions on equitable grounds. Scholars have noted that jurisdiction embodies societal values, such as federalism, separation of powers, and a limited national government. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 Hofstra L. Rev. 1, 36-37 (1994). All of these are relevant here. With respect to federalism, PSLRA deprives federal courts of jurisdiction to hear securities-based RICO claims, leaving the possibility for state action. With respect to separation of powers, PSLRA reflects the authority of Congress to control the jurisdiction of lower courts. With respect to limited government, the PSLRA amendment guarantees businesses a more predictable operating environment free from the disruptions caused by frivolous RICO suits in federal courts.

(3) The practical effect of the provision's enactment illustrates its jurisdictional character.

Third, this Court should consider the effects of characterizing the provision as jurisdictional or procedural. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513-16 (2006). Those effects should give clues as to whether a jurisdictional or procedural characterization makes sense in the statutory

scheme. Dodson, *supra*, at *77. In the case at bar, the effect of PSLRA was a massive exodus of securities claims from federal to state courts that lasted until the enactment of SLUSA in 1998, 15 U.S.C. §§ 77p, 78bb(f)(1)-(2). See *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002). It is thus apparent that post-PSLRA plaintiffs recognized that the federal courts would simply have no authority to hear their cases anymore. Had the bar on securities-based RICO been only a procedural, non-jurisdictional rule, parties could have waived PSLRA's requirements to remain in the federal forum.

(4) Earlier rulings have addressed the predicate act limitations in jurisdictional terms.

Fourth, the notion of doctrinal consistency asks how the particular provision and its doctrinal equivalents have been characterized historically. *Bowles v. Russell*, 551 U.S. 205, 210, n.2 (2007). If a particular type of provision has been characterized as jurisdictional uniformly on prior occasions, doctrinal consistency would suggest that it should continue to be held jurisdictional. While the specific issue now under review has come up very infrequently before PSLRA's passage, there have been some cases that treated the predicate acts of RICO as its jurisdictional foundation. Specifically, a federal court has ruled that the National Labor Relations Board did not have jurisdiction over a RICO claim because certain violations under the NLRA, 29 U.S.C. § 151 *et seq.*, could never be used as predicate acts to establish RICO violations. *Hood v. Smith's Transfer Corp.*, 762

F. Supp. 1274, 1286 (W.D. Ky. 1991). In that case, it was held that to find jurisdiction over RICO, the tribunal had to be vested with jurisdiction to entertain RICO's predicate acts. More recently, in 2006, the Ninth Circuit affirmed an opinion from the Central District of California where the court found that since the action was based upon fraud in the sale of a security, petitioners' basis for jurisdiction under the RICO statute was barred pursuant to PSLRA. *Powers v. Wells Fargo Bank, N.A.*, Case No. CV 04-398-ER (C.D. Cal. 2004). The Ninth Circuit affirmed the district court's dismissal of the action. *Powers v. Wells Fargo Bank, N.A.*, 439 F.3d 1043, 1045 (9th Cir. Cal. 2006).

Altogether, a careful analysis of the four criteria that this Court previously used to classify enactments that straddle the jurisdiction/procedure line reflects PSLRA's jurisdictional character.

B. The circuits are split on an important question of law because of the lack of guidance as to whether PSLRA's prohibition against securities-based RICO is a jurisdictional limitation. This has resulted in inconsistent case-by-case decisions.

The Court should grant the writ of *certiorari* because the lack of certainty on the issue of the jurisdictional effect of PSLRA on civil RICO created circuit splits that run far and wide relative to the amendment's retroactive application. The lower courts misconstrued the jurisdictional effect of the RICO amendment and misapplied the retroactivity analysis.

Clarity and order can be restored if this Court once and for all properly acknowledges the PSLRA amendment's limitation on the jurisdiction of federal courts. This Court should recognize that PSLRA ousted the basis for federal jurisdiction over a specific category of cases.

In line with this Court's precedent, the long-standing rule is that jurisdiction-ousting statutes apply to pending cases. *See, e.g., Brunet v. United States*, 343 U.S. 112 (1952) (Tucker Act claim dismissed for lack of jurisdiction where the intervening statute withdrew district court's jurisdiction to hear a claim); *Hallowell v. Commons*, 239 U.S. 506 (1916) (suit to establish equitable title of an alleged heir of an Indian allottee dismissed for lack of jurisdiction where the intervening statute gave Secretary of Interior sole power to determine legal heirs of Indian descendants); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567 (1870) (suit to recover excessive duties paid dismissed for lack of jurisdiction where the intervening statute repealed the act on which federal court jurisdiction was based). As such, historically, jurisdictional statutes have been applied to cases pending at their enactment without regard to the claims or defenses of particular litigants.

Significant splits in authority resulted from the uncertainty as to whether PSLRA's prohibition on securities-based civil RICO was a jurisdictional limitation. What happened is that many courts considering the retroactive application of PSLRA started relying on *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), a case where this Court held that a statute implicates retroactivity concerns if it impairs

rights a party possessed when he acted or increases a party's liability for past conduct. *Id.*, at 280.

Landgraf, a case that had nothing to do with jurisdiction, dealt with whether petitioner was entitled to a jury trial in a Title VII case for sexual harassment. *Id.* The *Landgraf* Court concluded that if a statute raises any concerns of retroactivity, that law would not actually be applied to events that occurred prior to its enactment absent clear Congressional intent favoring retroactive application. *Id.*

At the same time, in the course of its analysis in *Landgraf*, the Supreme Court examined its earlier jurisprudence as to the retroactive application of jurisdictional statutes. The Court concluded that present law governs whenever a new jurisdictional statute is enacted because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." *Id.*, at 274 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J. concurring)). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Thus, unlike situations where retroactivity would affect pre-existing rights, withdrawal of jurisdiction, although realistically disrupting settled expectations, does not preserve pending litigation. Consequently, the dismissal of every securities-fraud-based RICO action pending at the time of the PSLRA amendment's enactment should have taken place, had the lower courts realized PSLRA's jurisdictional character.

Following PSLRA's enactment, various federal courts, left without guidance as to the jurisdiction-ousting nature of the provision at issue, concluded on an *ad hoc* basis that the law's retroactive application was not warranted in certain cases, yet warranted in others. There were few guiding principles to provide for the uniformity of PSLRA's application throughout the United States.

As such, some courts have concluded that PSLRA may be invoked to bar RICO claims arising prior to its enactment at all times. *Reading Wireless Cable Television Partnership v. Steingold*, 1996 U.S. Dist. LEXIS 22152, 1996 WL 741432, at *2 (D. Nev. 1996); *see also Krear v. Malek*, 961 F. Supp. 1065, 1073 (E.D. Mich. 1997); *Rowe v. Marietta Corp.*, 955 F. Supp. 836, 848 (W.D. Tenn. 1997).

The second group of courts decided that PSLRA barred only those RICO claims that were based on pre-enactment conduct and that were not filed by the date of the statute's passage. The Eighth Circuit, where Bogart's case arises, held that PSLRA applies only to securities-based RICO claims commenced after its effective date, even if such claims are based on conduct which predated PSLRA. *Popp Telecom, Inc.*, 361 F.3d 482, 489 (2004). The Seventh Circuit in *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997) held that portions of the act evinced a clear intent to make PSLRA inapplicable to all claims pending upon enactment. In applying PSLRA to bar only unfilled claims based on pre-enactment conduct, courts in this second group distinguished between extinguishing some amorphous possibility of bringing a claim, and the right to pursue a claim once brought. *Fla. Evergreen*

Foliage v. E.I. Du Pont de Nemours & Co., 165 F. Supp. 2d 1345 (S.D. Fla. 2001).

A third group of courts concluded that PSLRA does not have the effect of precluding any claims arising before its enactment. In particular, the Third and the Ninth Circuits held that PSLRA did not bar civil RICO claims filed after PSLRA's effective date based on conduct occurring prior to its effective date. *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 161-63 (3d Cir. 1998); *Scott v. Boos*, 215 F.3d 940, 941 (9th Cir. 2000). Numerous district court opinions took an identical position. *See Baker v. Pfeifer*, 940 F. Supp. 1168, 1176-77 (S.D. Ohio 1996); *In re Prudential Sec., Inc. Limited Partnerships Litigation*, 930 F. Supp. 68, 81 (S.D.N.Y. 1996); *District 65 Retirement Trust v. Prudential Sec., Inc.*, 925 F. Supp. 1551, 1569 (N.D. Ga. 1996).

The uncertainty about PSLRA's jurisdictional character has resulted in profound discrepancies in the circuit courts' decisions that should be rectified. While the issue of PSLRA's retroactivity by itself is not likely to arise in the future, what the circuit splits illustrate is that the lower federal courts are without guidance as to whether the amendment constrains the jurisdiction of federal courts.

IV. THE QUESTION AS TO PSLRA'S JURISDICTIONAL LIMITATION ON RICO IS OF GREAT SIGNIFICANCE FOR COMMERCE, AND THIS CASE PRESENTS A SUITABLE VEHICLE FOR RESOLVING IT.

The question whether the PSLRA amendment to RICO is jurisdictional is an issue of great importance for commerce. The questions presented here are momentous indeed because the appellate court's decision threatens to undermine the very purpose of Congress in enacting PSLRA. The amendment was passed to shield legitimate businesses attracting investments from exposure to treble damages. It is largely the case that private businesses attracting equity and giving their stakes – *i.e.* securities – to investors are small and medium businesses, whose owners are not sophisticated in legal matters. If the limitation on bringing securities-fraud based RICO is a mere procedural rule, defendants could lose their right of objecting to being sued as racketeers simply because they or their lawyers did not timely plead PSLRA. The endeavors in Congress to end the “treble damage blunderbuss of RICO”⁴ and the whole societal debate culminating in the passage of the amendment would all be for naught. The efforts of many wise government administrators would be defeated by an unscrupulous defense counsel's negligence in not filing a PSLRA-based motion to dismiss.

⁴ 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995) (statement of Rep. Cox).

Furthermore, if PSLRA amendment is non-jurisdictional, district courts would not bear any independent obligation to investigate and raise potential claim defects whenever RICO is invoked in a securities case and the defendant does not know to object. Lastly, if the RICO amendment is non-jurisdictional, the court would not be the ultimate arbiter of any factual issues on which jurisdiction turns, and the PSLRA “affirmative defense” could be argued to the jury. If the statute compels these results, then this Court, not the Eighth Circuit should take the initiative to recognize it.

This case presents a particularly auspicious occasion for resolving the question as to PSLRA’s jurisdictional character because that issue – through counsel’s omissions – was not raised in the courts below. Ordinarily, appellate courts consider the merits of applying PSLRA to a RICO claim because prudent and conscientious practitioners raise all conceivable PSLRA issues before the trial judge. As such, appellate courts do not typically face the question of whether PSLRA is jurisdictional because they are presented with copious well-preserved arguments from the lower court on which to decide if the RICO claim is barred or not. Those courts have no need to reach the question of jurisdiction if the case can be disposed of on some other less fundamental argument that was made in the courts below. In Bogart’s case, since his trial lawyer defaulted on PSLRA argument in the district court, the only way to revive that issue would be to recognize the jurisdictional character of the amendment. In summary, at least in the near term, Bogart’s case is this Court’s best chance of giving the lower courts constructive guidance as to what effect

the PSLRA amendment has on civil RICO and of forever settling competing interpretations of an important federal law impacting commerce.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of *Certiorari* should be granted.

Dated this 31st day
of December 2013.

Respectfully submitted,

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