No. 04-___

IN THE

Supreme Court of the United States

R.J. FITZGERALD & CO., INC., RAYMOND FITZGERALD, AND LEIZA FITZGERALD,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether objective recklessness, defined as an extreme departure from standards of ordinary care, satisfies the scienter requirement for commodities and securities fraud established by *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), such that a trial court's findings of good faith and lack of subjective intent to defraud are irrelevant.

2. Whether commercial speech held not misleading by a trial court can be deemed misleading as a matter of law on the basis of an appellate court's conclusions that the speech would be "on balance" misleading to an objectively reasonable listener or that the speech omitted information that, while not necessary to counter any specific representation to the contrary, the appellate court believes "a reasonable investor *surely* would want to know."

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals included R.J. Fitzgerald & Co., Inc., Raymond Fitzgerald, Leiza Fitzgerald, Greg Burnett, Chuck Kowalski, and the Commodity Futures Trading Commission. R.J. Fitzgerald & Co., Inc., now defunct, was wholly owned by Raymond Fitzgerald and had no parent or related corporate entities. The decision below affirmed the trial court's judgment in favor of Greg Burnett and Chuck Kowalski. As prevailing parties below, they do not have an interest in the outcome of this petition.

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2 Thomas Hazen, *The Law of Securities Regulation* (4th ed. 2002) 9
Oliver W. Holmes, *The Common Law* (Dover 1991) 15
2 Philip Johnson & Thomas Hazen, *Commodities Regulation* (3d ed. 2003) 9
William Kuehnle, *On Scienter, Knowledge, & Recklessness Under the Federal Securities Laws*, 34 Hous. L. Rev. 121 (1997) 9, 15

1 W. LaFave & A. Scott, *Substantive Criminal Law* (1986).....10
Paul Milich, *Securities Fraud under Section 10(b) and Rule 10b-5: Scienter, Recklessness, and the Good Faith Defense*, 11 J. Corp. L. 179 (1986)...9, 15, 19

PETITION FOR A WRIT OF CERTIORARI

R.J. Fitzgerald & Co., Inc., Raymond Fitzgerald, and Leiza Fitzgerald respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-44a) is reported at 310 F.3d 1321. The opinion of the district court (Pet. App. 45a-76a) is reported at 173 F. Supp. 2d 1295. The district court's judgment on partial findings at the close of the CFTC's case-in-chief (Pet. App. 77a-86a) is unreported.

JURISDICTION

The district court had original jurisdiction under the Commodities Exchange Act, 7 U.S.C. § 13a-1, and 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 636(c)(3). The court of appeals entered its judgment on October 29, 2002, and denied petitioners' timely motion for rehearing or rehearing *en banc* on April 12, 2004. On June 29, 2004, Justice Kennedy granted petitioners' application to extend the time to file this petition for a writ of certiorari to August 10, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 6c(b):

> No person shall offer to enter into … any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an "option" … , contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

17 C.F.R. § 33.10(a), (c):

> It shall be unlawful for any person directly or indirectly:

(a) To cheat or defraud or attempt to cheat or defraud any other person;

* * *

(c) To deceive or attempt to deceive any other person by any means whatsoever

in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.

STATEMENT

Petitioners aired a television commercial and conducted a seminar advertising their commodities brokerage business, believing in good faith that these promotions were truthful and not misleading. The district court, after a trial, rejected the fraud claims brought by the Commodity Futures Trading Commission, concluding that petitioners' speech was not misleading and, even if it was, petitioners were not reckless and did not intend to mislead anybody. In a split decision, the Eleventh Circuit reversed, finding as a matter of law that petitioners' speech was misleading, that they fraudulently omitted to disclose the firm's trading record, and that they possessed scienter because their speech demonstrated an extreme departure from ordinary standards of care.

The Eleventh Circuit's holding on scienter joins the minority side of a circuit split on an issue previously left open by this Court. Its analysis also raises significant issues regarding the legal standard for fraudulent omissions and the deference due the finder of fact in evaluating the impact of speech on an objectively reasonable listener. The Eleventh Circuit's approach is difficult to square with decisions of this Court and with the standards in other areas of law governing misleading speech.

To address these issues and to alleviate the First Amendment concerns raised by the Eleventh Circuit's decision, this Court should grant review.

1. Statutory and Regulatory Framework

Section 4c(b) of the Commodity Exchange Act ("Act"), codified at 7 U.S.C. § 6c(b), authorizes the Commodity Futures Trading Commission ("Commission" or "CFTC") to regulate commodity option contracts. Under this authority, the Commission promulgated Rule 33.10, making it unlawful "[t]o cheat or defraud or attempt to cheat or defraud any other person," or "[t]o deceive or attempt to deceive any other person by any means whatsoever" in connection with any commodity option transaction. 17 C.F.R. § 33.10(a), (c).

The prohibitory language of Rule 33.10 is copied almost verbatim from § 4b of the Act, which makes it unlawful "to cheat or defraud or attempt to cheat or defraud," or "willfully to deceive or attempt to deceive" another person in connection with a commodity futures contract. § 4b(A), (C), codified at 7 U.S.C. § 6b(a)(i), (iii). The Commission interprets both provisions as requiring scienter. *See In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206, at 45,810, 1997 WL 778236, at *11 (CFTC Dec. 18, 1997).

This Court has stated that "[t]he language of § 4b is similar to that of § 10(b) of the Securities Exchange Act of 1934," and called SEC Rule 10b-5 "analogous" to the Act's anti-fraud provisions. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 389 n.88, 394 (1982). Since *Curran*, "courts faced with interpreting the anti-fraud provisions of the Commodities Exchange Act look to the more developed body of law addressing section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5." *FDIC v. UMIC, Inc.*, 136 F.3d 1375, 1384 n.4 (10th Cir. 1998).

2. The Proceedings to Date

Petitioner Raymond Fitzgerald owned a full-service commodities brokerage firm, petitioner R.J. Fitzgerald & Co. ("the firm"), a moderately successful business with over one thousand accounts. His spouse, petitioner Leiza Fitzgerald, was a licensed broker and part-time employee of the firm.

Although the firm offered advice, customers controlled all their own trading decisions. Pet. App. 45a-48a.

In early 1998, the firm recommended a trading strategy to some of its customers based upon extensive research predicting increased volatility in corn futures prices. It also sought to attract new customers with a television commercial on CNBC that discussed the potential impact of future weather events on grain markets and a seminar at a local library. These promotions yielded little to no business and were discontinued after being used a handful of times. Pet. App. 59a. Ultimately, the heightened market volatility did not yield the higher prices the firm predicted, and customers who adopted the recommended strategy lost substantially all the money that they put into the trade. Pet. App. 64a.

In July 1999, the CFTC's Division of Enforcement filed a complaint in federal district court alleging that petitioners and other employees of the firm engaged in a pattern and practice of fraud in violation of Rule 33.10 and other provisions. The specter of an investigation drove away the firm's customers, and it ceased operation completely by the end of 1999. In early 2001, the case was tried before United States Magistrate Judge Mary S. Scriven pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. The three-week bench trial included testimony by Mr. and Mrs. Fitzgerald, expert witnesses, and a host of the firm's customers and employees.

At the close of the government's evidence, the trial court issued a "directed verdict" for petitioners on several claims. The court deemed "not credible" the expert proffered by the CFTC and found no evidence that petitioners ever made a misleading claim that customers could profit by trading based on seasonal trends in demand. Pet. App. 83a. The court also held that petitioners had no duty to disclose the firm's win/loss record because they made no representations about the success of the firm's clients and because the CFTC did not establish the firm's track record at the relevant point in time. Pet. App. 79a-80a.

After trial, the court entered final judgment for petitioners on the remaining claims, holding that the firm consistently provided all legally required risk disclosures, that none of its advertising or promotions were misleading, and that, in any case, none of the petitioners possessed scienter for fraud. The trial court held that virtually all significant customer and expert testimony offered by the CFTC was not credible, and rejected its assertions of intentional misconduct by petitioners. In contrast, the court found that Mr. and Mrs. Fitzgerald "testified credibly" about their attention to compliance, truthfulness, and full risk disclosure in training, solicitation, and trading. Pet. App. 58a-59a. The court also held that petitioners took reasonable steps to ensure that the firm complied with the law, and that circumstantial evidence further demonstrated an absence of scienter. For example, Mr. Fitzgerald edited the commercial to include additional risk disclosures and to display them more prominently. Pet App. 64a. He submitted both the commercial and the seminar script for review to the legal compliance department of Iowa Grain, the firm's guarantor, and published them only after obtaining approval and incorporating all recommended changes. The court also recognized that petitioners modeled their profit illustrations on publications by industry regulators like the National Futures Association and provided "ample disclosure regarding the high risks involved." Pet. App. 69a.

After petitioners filed a motion for attorney's fees, the CFTC appealed the judgment. The CFTC's briefs were intensely factual, relying heavily on rejected evidence and witness testimony that the trial court rejected as not credible. Nevertheless, two judges of the Eleventh Circuit panel accepted the CFTC's argument that, "regardless of the [district] Court's factual findings based on witness credibility, Defendants committed fraud … as a matter of law." Pet. App. 6a. Ignoring the testimony and evidence presented at trial, the majority limited its analysis to a *de novo* review of the text of the commercial and the script of the seminar, which it

characterized as "undisputed matters of record." Pet. App. 13a. It held that these promotions were "unbalanced" and misleading as a matter of law based on their "*overall message*," and how that message would be interpreted by an "objectively reasonable" person. Pet App. 13a, 17a. The court also found that petitioners committed fraud as a matter of law by not disclosing that "more than 95% of the firm's clientele lost money," without recognizing or overturning the trial court's finding that the CFTC did not establish any factual basis for the firm's trading record. Pet. App. 19a.

The majority also found scienter for fraud as a matter of law because the text of the commercial and seminar demonstrated that petitioners "deviated in an extreme manner from the standards of ordinary care." Pet. App. 15a, 19a. Its basis for this conclusion was that "this Court and the CFTC have previously condemned" similar promotions. Pet. App. 15a, 19a. The majority did not address the testimonial and circumstantial evidence of subjective good faith or overturn the trial court's findings, but ruled that the promotions themselves were dispositive. Pet. App. 15a-17a, 18a-19a. Accordingly, the court of appeals found petitioners committed fraud in violation of Rule 33.10 and remanded.

Circuit Judge Wilson dissented. After a detailed analysis of petitioners' speech as well as testimonial and circumstantial evidence, he concluded that there were "no misleading or deceptive statements" in the commercial and seminar, and that the promotions at issue "effectively and sufficiently disclose[d] the magnitude of risk involved." Pet. App. 37a, 35a. He noted that the majority failed to identify any source of a "duty … to disclose [the firm's] prior track record" as required to make such an omission fraudulent. Pet. App. 42a. He also rejected the notion that scienter could be established by mere reference to what he called the majority's "oversimplifications of prior cases." Pet. App. 37a.

After pending for sixteen months, petitioners' timely request for rehearing or rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

Today, in some circuits but not in others, a broker who genuinely believed that his assertions were true and not misleading can be guilty of fraud if a court decides, after the fact, that his speech was misleading. This divergence flows from the question, repeatedly recognized but never addressed by this Court, "whether, in some circumstances, reckless behavior is sufficient for civil liability under" the commodities and securities laws. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976). The circuits generally agree that some form of recklessness can satisfy the scienter requirement for commodities or securities fraud. But a split has developed because "the term recklessness is not self-defining." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). On the one hand, the objective standard "calls a person reckless who acts … in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* On the other hand, the subjective standard "permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Id.* at 837. The Eleventh Circuit applied an objective test and found petitioners guilty of fraud; but they would have been innocent, based on the trial court's findings, in circuits where a defendant must be "cognitively aware of the danger" in order to possess "the requisite subjective intent." *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 669 (D.C. Cir. 1996). This case presents an opportunity to resolve this important issue.

This case also raises significant questions regarding the standards for holding speech misleading. Both the Eleventh Circuit's *de novo* assessment of the effect of speech on a reasonable listener and its broad view of when an omission is misleading are difficult to square with decisions of this and other courts. Taken together with its determination of scienter as a matter of law, the Eleventh Circuit's approach to fraud raises serious First Amendment concerns. Accordingly, review by this Court should be granted.

I. THE DECISION BELOW EXACERBATES A CIRCUIT SPLIT AS TO WHETHER OBJECTIVE "RECKLESSNESS" CONSTITUTES SCIENTER FOR COMMODITIES OR SECURITIES FRAUD

Like the parallel fraud provisions of the securities laws, Rule 33.10 and § 4b of the Act require *scienter*, that is, "a mental state embracing intent to deceive, manipulate, or defraud." *Hochfelder*, 425 U.S. at 193-94 n.12 (establishing the scienter requirement for securities fraud); *see also Curran*, 456 U.S. at 389 n.88, 394 (referring to securities and commodities fraud provisions as "analogous"); *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep ¶ 24,617, at 36,658-59; 1990 WL 282810, at *5 (CFTC Mar. 1, 1990) (following the federal courts' "symmetrical approach" to scienter requirements for securities and commodities fraud); . *Hochfelder* explained that the language of § 10(b) (making unlawful "any manipulative or deceptive device or contrivance") "clearly connotes intentional misconduct." 425 U.S. at 197, 201. An identical scienter requirement is found in the language of § 4b and Rule 33.10 that makes it unlawful "to cheat or defraud" or "to deceive" any person. *See Staryk*, 1997 WL 778236, at *10 (holding that these words "convey clear connotations of wrongful intent"); *CFTC v. Savage*, 611 F.2d 270, 284 n.14 (9th Cir. 1980) (noting that the Act's language and legislative history emphasize prevention of "fraud and other intentional actions").

Overturning several lower court decisions permitting a finding of securities fraud based on negligence, the Court noted in *Hochfelder*:

> In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5.

425 U.S. at 193-94 n.12. The Court has on several subsequent occasions reserved decision on this question.[1]

As elaborated in the following sections, a well recognized split has developed among the circuits as to whether objectively reckless conduct, without more, establishes scienter for commodities or securities fraud.[2] The source of the split is that "the term recklessness is not self-defining." *Farmer*, 511 U.S. at 836. In *Farmer*, the Court addressed a similar split on the question whether the Eighth Amendment requires "a subjective standard of recklessness" for a claim based on prison conditions. *Id*. at 832. An objective approach

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[1] *See Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (reserving the question "whether, under some circumstances, scienter may also include reckless behavior"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 n.4, 379 n.5 (1983) (recognizing "the prevailing view" that reckless behavior can satisfy the scienter requirement for securities fraud, and referring to the "analogous" provisions of the commodities laws); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 508 U.S. 959 (1993) (granting certiorari on whether recklessness constitutes scienter for aiding and abetting securities fraud), 511 U.S. 164, 191 (1994) (deciding the case on other grounds).

[2] Several commentators have recognized the disparate approaches to scienter among the lower courts and the need for resolution by this Court. *See, e.g.*, 2 Thomas Hazen, *The Law of Securities Regulation* § 12.8[3], at 434 (4th ed. 2002) ("Resolution of the availability of a recklessness standard, as well as a more explicit definition, must await Supreme Court determination."); 2 Philip Johnson & Thomas Hazen, *Commodities Regulation* § 5.08[1], at 5-91 (3d ed. 2003) ("[T]he wealth of decisions regarding intent in fraud cases … offer solace for nearly every possible formulation."); William Kuehnle, *On Scienter, Knowledge, and Recklessness Under the Federal Securities Laws*, 34 Hous. L. Rev. 121, 125-26 (1997) (discussing the circuit split on "the issue of recklessness raised in *Hochfelder*," and noting that, in 1995, Congress left "the question of the existence of that basis of liability and its definition back in the hands of the Supreme Court"); Paul Milich, *Securities Fraud Under Section 10(b) and Rule 10b-5: Scienter, Recklessness, and the Good Faith Defense*, 11 J. Corp. L. 179, 180 (1986) ("There is little uniformity … among the circuits or even among different panels of the same circuit, on how proof of recklessness should be used to satisfy scienter.").

"generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id*. at 836. This standard in essence "conclusively presume[s] awareness from a risk's obviousness." *Id.* at 840. The subjective approach, in contrast, "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Id.* at 837. Under this standard, an obvious risk may justify an inference of subjective knowledge, "but the inference cannot be conclusive, for we know that people are not always conscious of what reasonable people would be conscious of." *Id*. at 842 (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.7, at 335 (1986)).

Tracking this distinction, the circuit courts have taken two different approaches to scienter for fraud under the commodities and securities laws. In circuits adopting a subjective standard, the relevant question is, what was the defendant's state of mind? Like other circumstantial evidence, objectively reckless behavior may support an inference that the defendant intended to defraud or knew but disregarded the risk that his statements were misleading. In contrast, circuits adopting an objective standard, like the Eleventh Circuit decision below, equate scienter with objectively "reckless" conduct. The relevant question becomes, did defendant depart in an extreme manner from the ordinary standards of care? Once an extreme departure is shown, scienter is conclusively established: good faith is no defense, and further evidence as to the defendant's actual state of mind is irrelevant.

This difference is not merely technical. The objective approach largely collapses scienter into the analysis of whether a defendant made a misrepresentation. Under the subjective approach, the analyses are less intertwined, and what was said may reveal comparatively little about the speaker's state of mind. This difference can significantly affect outcomes, as

it did in the present case. It can also significantly alter the procedural protections available to a fraud defendant. Under an objective test, summary judgment is possible where an extreme departure can be found as a matter of law. But under a subjective test, a genuine dispute as to a defendant's state of mind requires a trial, with the factfinder's determinations entitled to substantial deference under Rule 52 of the Federal Rules of Civil Procedure. *See, e.g., United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."). Thus, until the split is resolved, whether a defendant is guilty of commodities or securities fraud and the process to which he is entitled may vary significantly based on the circuit in which the case is brought.

A. Several Circuits Apply a Subjective Standard for Scienter Under Which Reckless Conduct Is Merely Evidence of Defendant's State of Mind

In the Ninth Circuit, commodities fraud requires "that [defendant's] acts be done with knowledge of their nature and character." *CFTC v. Savage*, 611 F.2d 270, 283 (9th Cir. 1980) (reversing a judgment finding scienter as a matter of law under § 4b). Recognizing that a defendant's "intent and knowledge are particularly within his personal comprehension," the court held that the defendant's affidavit established a "genuine issue of material fact" as to his subjective mental state. *Id*. at 282-83. Thus, the factfinder's evaluation of a defendant's proffered testimony about his state of mind is *essential*, and unless internally inconsistent, "can virtually never be clear error" subject to reversal on appeal. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).[3]

[3] The Ninth Circuit recently reaffirmed this position in a decision that has become the touchstone for the dispute among the circuits over pleading standards under the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2) (1997). *In re Silicon Graphics Inc. Sec. Litig.*,

The D.C. Circuit explicitly treats scienter as a subjective inquiry. In *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992), the court rejected the SEC's argument – identical to the Eleventh Circuit's holding in the present case – that scienter was established because "it should have been obvious to [defendants] that the advice they received … was wrong" given their "extensive experience in the securities industry." *Id*. at 642. Instead, the court held that scienter could not be established without evidence of "bad faith." *Id*. Fraud liability could not be imposed absent evidence sufficient to "permit a finding that [defendants] *actually knew* the opinion was wrong or [were] reckless in relying on it." *Id*. (emphasis added). Judge Silberman subsequently explained that, although a defendant's "intent may be inferred from indirect evidence and the reckless nature of his acts," this test cannot be "satisfied by merely showing an extreme departure from standards of ordinary care." *Saba*, 78 F.3d at 668, 669 (discussing *Steadman* and *Farmer*).

The First Circuit applies a similar subjective test. In *Rodriguez v. Montalvo*, 871 F.2d 163 (1st Cir. 1989), then-Judge Breyer affirmed the district court's admission of testimony by a Catholic priest, defendant's "spiritual advisor," because it tended to show an absence of "the 'fraudulent intent' necessary for liability under Rule 10b-5." *Id*. at 165 (citing *SEC v. MacDonald*, 699 F.2d 47, 50-51 (1st Cir. 1983)). *MacDonald* also held that "[d]efendant had a right to testify …

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183 F.3d 970, 976-77 (9th Cir. 1999); *cf. Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282-84 (11th Cir. 1999) (discussing the varying standards and explicitly rejecting *Silicon Graphics*). *Silicon Graphics* held that *Hochfelder* compels treating recklessness "as a form of intentional or knowing misconduct." 183 F.3d at 976. Thus, in the Ninth Circuit, a securities fraud plaintiff must "plead, at a minimum, particular facts giving rise to a strong inference of *deliberate or conscious recklessness*." *Id.* at 979 (emphasis added).

for the purpose of establishing his state of mind." 699 F.2d at 50-51. *See also Backman v. Polaroid*, 893 F.2d 1405, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,899, at 94,946 (1st Cir. 1990) (holding that it was reversible error not to instruct the jury on good faith as a defense, because "[i]t is possible for a defendant to be objectively reckless – to disregard a danger that would be obvious to the ordinary person – and still act in subjective good faith"), *withdrawn on reh'g en banc*, 910 F.2d 10 (1st Cir. 1990) (ruling for defendant on other grounds).

The Fifth Circuit, although not as explicitly, adopts a subjective approach. That court recently stated that scienter involves "the state of mind of the individual corporate official" who "knows that the statement is false, or is at least deliberately reckless as to its falsity, at the time he or she makes the statement." *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (quoting *In re Apple Computer, Inc. Sec. Litig.*, 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002)). The court explained that scienter is "an essentially subjective state of mind" that "*must actually exist* in the individual making … the misrepresentation." *Id.* (emphasis added). *See also, e.g., Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 962 (5th Cir. 1981) (*en banc*) (recognizing the significance of "testimony … that the parties thought themselves to be under no legal duty to disclose").[4]

Finally, contrary to the agency's litigating position below, the Commission itself interprets the fraud provisions of the Act and its own Rules to require evidence of subjective culpability. An administrative law judge granted summary

[4] Although the Eighth Circuit standard is unclear, its position seems consistent with a subjective standard. *See, e.g., SEC v. Kluesner*, 834 F.2d 1438, 1440 (8th Cir. 1987) (agreeing that the SEC's case was not "substantially justified" and awarding attorney's fees to a fraud defendant where the SEC did not challenge as clearly erroneous the district court's findings based on trial testimony that the defendant "acted with 'reasonable belief' and did not recklessly or intentionally act to deceive others").

judgment against a broker for violating Rule 33.10 by employing egregious solicitations, such as statements to customers that the risk of loss on commodity options was equivalent to the likelihood that someone would "cancel the Fourth of July" or "cancel Memorial Day." *Staryk*, 1997 WL 778236, at *3. In a unanimous decision, the full Commission reversed on appeal. Despite agreeing that Staryk's representations were undeniably misleading or "blatantly false," *id*. at *4, *8-10, it held that "[w]hile the deceptive nature of Staryk's solicitations was determined according to an objective standard, *his intent in making those representations is a subjective question*," and Staryk would be "prejudiced if his state of mind is determined against him without an opportunity for him to appear in person before a trier of fact." *Id*. at *12 (emphasis added); *see also id.* at *11 (discussing *Savage*, 611 F.2d at 282).[5]

B. Several Circuits Equate Scienter with Objectively Reckless Conduct

Some circuits adopt an approach that treats objective recklessness as a synonym for scienter. This formulation has its roots in an extremely amorphous and confusing Seventh Circuit case, *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033 (7th Cir. 1977), that was decided just after *Hochfelder* and contains language supporting every conceivable formulation for recklessness. *Sundstrand* defined recklessness as "an extreme departure from the standards of ordinary care,

[5] The SEC has similarly recognized that "[s]ubjective good faith is inconsistent with a finding of knowing or intentional, *including reckless*, conduct" under the fraud provisions of the securities laws. Amendments to Rule 102(e) of the Commission's Rules of Practice, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,052, at 80,849 (Oct. 19, 1998), *discussed in Marrie v. SEC*, __ F.3d __, 2004 WL 1585848, at *6-7 (D.C. Cir. July 16, 2004) (noting that, unlike fraud provisions, SEC Rule 102(e) governing "improper professional conduct" permits liability without scienter by showing an "extreme departure from standards of ordinary care").

and which presents a danger of misleading the buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* (quoting *Franke v. Midwestern Okla. Devel. Auth.*, 428 F. Supp. 719 (W.D. Okla. 1976)). The court described the *Franke* test as having an objective and subjective component, *id.* at 1045 n.19 & n.20, but then equated the second component with a "reasonable man" standard, *id.* at 1045. *Sundstrand* recited the flatly wrong statement that "good faith is not appropriate as a defense to reckless or intentional behavior." *id.* at 1044 n.17 (citing *McLean v. Alexander*, 420 F. Supp. 1057, 1081 (D. Del. 1976)).[6] *Sundstrand* also relied on Oliver Wendell Holmes, who defined recklessness as "a general objective standard" whereby a man making a false statement "is liable, whatever was the state of his mind, and although he individually may have been perfectly free from wickedness in making it." O. Holmes, The Common Law 136 (Dover 1991); *cf. Farmer*, 511 U.S. at 837 (recognizing and implicitly rejecting Holmes's "objective approach to criminal recklessness"). As a result, subsequent courts virtually never reference *Sundstrand*'s subjective gloss, instead holding that recklessness is established if a danger is "obvious" such that a reasonable person in defendant's position must have been aware of it. *See* Milich, 11 J. Corp. L. at 194-95 (explaining that the *Franke* definition "creates an irrebuttable presumption of fraud based on an objective assessment that the defendant behaved recklessly"); Kuehnle, 34 Hous. L. Rev. at 180 (describing the "problematic origin" of this definition in *Franke*'s reliance on a common law definition of recklessness for physical torts, as opposed to fraud).

Taking exactly this approach, the Eleventh Circuit decision below equates scienter with objective recklessness: "For

[6] Subsequent to *Sundstrand*, the Third Circuit reversed *McLean* on precisely this point, by equating scienter with "bad faith." 599 F.2d 1190, 1198 (3d Cir. 1979).

purposes of fraud or deceit in an enforcement action, scienter is established … if Defendant's conduct represents an extreme departure from the standards of ordinary care." Pet. App. 12a. Thus, the court of appeals found scienter "as a matter of law" because Mr. Fitzgerald, "as a federally registered professional, knowledgeable in the nuances and complexities of the industry, deviated in an extreme manner from the standards of ordinary care." Pet. App. 15a.[7] It "premised" this conclusion solely "on the fact that this Court and the CFTC have previously condemned attempts to attract customers" with supposedly similar promotions. Pet. App. 15a. The court of appeals rejected the argument that it should defer to the trial court's findings as to the defendants' state of mind. Instead, it accepted the CFTC's position that, "*regardless of the [district] Court's factual findings based on witness credibility*, Defendants committed fraud … as a matter of law." Pet. App. 6a. (emphasis added).

The Sixth Circuit also defines scienter as "highly unreasonable conduct which is an extreme departure from standards of ordinary care." *Helwig v. Vencor, Inc.*, 251 F.3d 540, 550 (6th Cir. 2001) (*en banc*) (interpreting and applying Rule 10b-5 and the PSLRA). In a 7–6 decision, the majority rejected the position that scienter requires facts sufficient to justify an "inference that management *actually knew* its statements were false or misleading." *Id*. at 572 (Kennedy, J., dissenting) (emphasis added). Similarly, that court previously held that scienter was established where certain errors were "'so obvious that *any reasonable man would have known of them*.'" *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 553 (6th Cir. 1999) (emphasis added) (quoting *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979)). In the Sixth Circuit, *Hochfelder* is limited to "its

[7] Notably, the court of appeals reversed the trial court's judgment in favor of Mrs. Fitzgerald but offered no basis for its necessarily implicit conclusion that Mrs. Fitzgerald also possessed scienter for fraud.

specific holding that mere negligence is not enough for liability," and "the danger" that statements are misleading "need not be known" to the defendant. 598 F.2d at 1025.

The Second Circuit also articulates what amounts to an objective test for recklessness, echoing the *Sundstrand* error by holding that "good faith does not constitute a defense to reckless or intentional conduct." *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46 n.15 (2d Cir. 1978) (citing the later-reversed district court decision in *McLean*). Similarly, the Second Circuit has held that scienter can be established by showing that defendants had "access to information contradicting their public statements," because "[u]nder such circumstances, defendants knew *or, more importantly, should have known* that they were misrepresenting material facts related to the corporation." *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (quoting *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)) (emphasis added). Applying these pleading decisions to proof issues, district courts within the Second Circuit have rejected the need to inquire whether a defendant subjectively appreciated the risk that his statements were false or misleading. For example, in *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475 (S.D.N.Y. 2002), the court granted summary judgment on fraud claims against a defendant who asserted that he was misled by another party and was therefore subjectively unaware that his own statements were false. "The question is not whether he was 'duped' into believing … misrepresentations, but whether … he *should have reasonably known otherwise*." *Id.* at 495 (emphasis added). *See also, e.g., In re Mercator Software, Inc. Sec. Litig.*, 161 F. Supp. 2d 143, 149 (D. Conn. 2001) (citing *Novak* to find adequate a pleading that defendants "should have known" that certain statements were false).[8]

[8] Other courts have not clearly articulated a position, but appear to favor an objective approach. Despite its previous decision equating scienter with "bad faith," *see McLean*, *supra* n.6, the Third Circuit more recently

C. The Objective Approach to Scienter Adopted by the Decision Below Is Wrong

The language of Rule 33.10 and the Court's decision in *Hochfelder* make clear that, to satisfy the scienter requirement for commodities fraud, recklessness must constitute the equivalent of intentional conduct. The operative provisions of Rule 33.10, making it unlawful "to cheat or defraud" or "to deceive" any person, "convey clear connotations of wrongful intent." *Staryk*, 1997 WL 778236, at *10; *see also Savage*, 611 F.2d at 284 n.14 (explaining that the Act's legislative history emphasizes prevention of "fraud and other intentional actions"). And while *Hochfelder* left open the possibility that recklessness could, in some circumstances, satisfy the scienter requirement, the Court expressly referred to "certain areas of the law" in which "recklessness is considered to be *a form of intentional conduct*." 425 U.S. at 194, n.12 (emphasis added). The D.C. Circuit has explained that only a subjective formulation of recklessness "is a legitimate substitution for intent to do the proscribed act because, if shown, it is a proxy for that forbidden intent." *Saba*, 78 F.3d

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stated that "a subjective belief that demonstrates good faith" is not inconsistent with finding of recklessness and, therefore, scienter. *SEC v. Infinity Group Co.*, 212 F.3d 180, 193 & n.16 (3d Cir. 2000). The Tenth Circuit suggests that scienter can be based on objective recklessness less than that required to infer actual knowledge, *see, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996); *see also, e.g., SEC v. Autocorp Equities, Inc.*, 292 F. Supp. 2d 1310, 1322 (D. Utah 2003) (finding fraud as a matter of law based on objective recklessness). However, an unpublished Tenth Circuit decision (cited by the CFTC in *Staryk*, 1997 WL 778236, at *11) clearly applied a subjective test in reversing summary judgment against a defendant who proffered testimony that he did not know of the alleged conduct. *SEC v. Johnston*, 972 F.2d 357, 1992 WL 180130, at *2 & n.5 (10th Cir. 1992) (stating that scienter can be found as a matter of law only if defendant's testimony "were *impossible* to believe") (emphasis in original).

at 668 (citing *Hochfelder*, 425 U.S. at 193 & n.12). Discussing *Farmer*, *Saba* explained that the "Supreme Court's reasoning makes quite clear that the key divide is not between nominally 'civil' and 'criminal' recklessness, but between a means of imposing liability that requires a showing of intent and one that does not." *Id*. at 669 (footnote omitted). Thus, because the securities laws require an equivalent of intent, scienter requires a subjective inquiry, and cannot be "satisfied by merely showing an extreme departure from standards of ordinary care." *Id.*

Hochfelder also equated scienter with a finding that a person "acted other than in good faith." 425 U.S. at 206. The English securities fraud case of *Derry v. Peek*, 14 App. Cas. 337, 5 T.L.R. 625 (H.L. 1889), established the rule that good faith is an absolute defense to fraud, such that fraud liability cannot be imposed on defendants who "honestly believe[d] the truth of the[ir] representation." *Id.* at 345. Addressing the "confusion between that which is evidence of fraud and that which constitutes it," *id.* at 369, Lord Herschell explained that objectively reckless conduct should not be equated with fraud, even though it may be used "to assert circumstantially that the defendant lacked an honest belief in the truth of his statement," Milich, 11 J. Corp. L. at 189.

The Eleventh Circuit's decision used objective conduct not as evidence of petitioners' state of mind, but as a *substitute* for such evidence. Its holding that "scienter is established … if Defendant's conduct represents an extreme departure from the standards of ordinary care," Pet. App. 12a, cannot be reconciled with the decisions of this Court, Rule 33.10, or the common law roots of the fraud statutes.

II. THE COURT OF APPEALS' RULING THAT THE CHALLENGED PROMOTIONS WERE MISLEADING AS A MATTER OF LAW IS INCONSISTENT WITH THE DECISIONS OF THIS AND OTHER COURTS

The decision below goes beyond punishing petitioners for truthful speech uttered in good faith by punishing them for *failing* to make statements that they had no duty to make. Compounding its improper analysis of scienter, the majority held that petitioners committed fraud as a matter of law by failing to disclose the firm's trading record, but identified no basis for finding that petitioners had any duty to make such disclosures. Eliminating any remaining procedural safeguards, the majority also refused to defer to the trial court's findings as to what a reasonable listener would have inferred from petitioners' advertisements, instead undertaking its own independent analysis and concluding that the promotions were "on balance" misleading as a matter of law. In both respects, the decision below is difficult to square with the decisions of this and other courts, highlighting an issue that merits this Court's clarification.

A. The Eleventh Circuit Applied an Incorrect Legal Standard by Imposing Fraud Liability for Failure To Disclose Information That Petitioners Had No Duty To Disclose

The Eleventh Circuit held that petitioners committed fraud by not disclosing the "fact" that "more than 95% of Defendants' customers lost money" because that was information that "a reasonable investor *surely* would want to know." Pet. App. 19a & n.9. Setting aside that this "fact" was directly contradicted by the trial court's findings, the decision below conflicts with established law by failing to identify any statute, regulation, or affirmative statement by petitioners that gave rise to a duty to disclose the firm's trading record. *See* Pet. App. 19a (listing statements about potential magnitudes of profits and losses but no representations about their likeli-

hood or the successes of past customers).

It is plain that failure to disclose even material information is not fraudulent absent a duty to disclose. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading."); *Chiarella v. United States*, 445 U.S. 222, 235 (1980) (A duty to speak "does not arise from the mere possession of nonpublic market information."). As the CFTC conceded, petitioners had no statutory or regulatory duty to disclose the firm's trading record. Accordingly, petitioners would have a duty to disclose the firm's customers' trading record only if they made statements that would be misleading unless qualified by such a disclosure, *e.g.*, asserting that they have a "special ability to achieve profits for customers." *Lehoczky v. Gerald, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,441, at 42924-25, 1995 WL 355284, at *9 (CFTC June 12, 1995), *aff'd sub nom Lehoczky v. CFTC*, 125 F.3d 844 (2d Cir. 1997). *See also Modlin v. Cane*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,059, at 49,549-50 (CFTC Mar. 15, 2000) (disclosure required to cure representations that defendant "would jump into the East River" if he was unable to generate a profit).

There are strong constitutional reasons for insisting on such a connection between a person's speech and any mandatory disclosures. "[U]njustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Accordingly, although "[t]he government can impose affirmative disclosures in commercial advertising," such disclosures must be "reasonably related to preventing the public from being deceived or misled." *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 994 (7th Cir. 2000). And, such a disclosure requirement "must be no broader than necessary to prevent the deceptive or misleading advertising engaged in by the party." *Id.*

The Eleventh Circuit contravened established law and offended these constitutional principles by rejecting the need to link the disclosures it mandated with petitioners' affirmative representations. Instead, the majority opinion equated materiality with a duty to disclose, by ruling that:

> The focus of the inquiry is not on how well or how poorly others firms have done or even, in some circumstances, whether a firm has affirmatively boasted about a particular win-loss record. Rather, the judicial cross hairs in this case fall squarely on what the investor would reasonably want to know before deciding to commit money to a broker.

Pet. App. 20a; *cf.* Pet. App. 79a (finding no evidence that petitioners "made any affirmative representation about the success of their customers, specifically or generally"). This violates the principle that "[m]ateriality alone is not sufficient to place a company under a duty of disclosure." *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997). By abandoning the requirement of a nexus between petitioners' speech and the disclosure duty it imposed, the decision below establishes a vague and burdensome rule that conflates a duty to disclose information with the materiality of that information and thereby threatens to chill legitimate commercial speech protected by the First Amendment.

B. The Eleventh Circuit Improperly Substituted Its Own Views for the Trial Court's Judgment That the Promotions Were Not Misleading

The Eleventh Circuit rejected any need to defer to the trial court's determinations under Rule 52 of the Federal Rules of Civil Procedure. It justified its rejection of Rule 52 by asserting that it could read the petitioners' promotions as well as the district court. But whether speech is misleading turns on context, and the Eleventh Circuit paid context no heed.

The majority admittedly evaluated petitioners' speech by conducting an independent review of its text in isolation

from all other testimony and evidence:

> The parties obviously do not contest the textual content of the Commercial. The actual words of the Commercial and how the Commercial physically appeared on television are undisputed matters of record and do not require us to second guess what the District Court concluded with regard to witness demeanor and credibility at the bench trial. That being said, we are persuaded that these undisputed facts demonstrate fraud and deception as a matter of law.

Pet. App. 13a; *see also* Pet. App. 17a-18a (applying similar treatment to the seminar).

The court of appeals ignored substantial contextual evidence supporting the trial court's conclusion that petitioners' speech was not misleading. For example, documents showed that the profit illustrations in the commercial and seminar were substantially similar to those found in investor education publications by the Chicago Board of Trade and the National Futures Association, and petitioners testified that they "plagiarized" those materials, believing in their legitimacy. Pet. App. 9a n.4, 31a, 69a. Similarly, the majority ignored evidence putting the seminar into context, including the documents that were handed out to seminar attendees and the testimony of the one CFTC trial witness who attended the seminar and admitted "that risk of loss was described to her." Pet. App. 69a. At the same time, the majority selectively extracted testimony from the record to support its reasoning, even where the evidence was rejected by the trial court.[9]

[9] For example, the majority held that the firm fraudulently failed to disclose its trading record because "RJFCO's principal, Raymond Fitzgerald, testified that more than 95% of Defendants' customers lost money." Pet. App. 19a n.9. That supposed "fact" was taken out of context from a deposition, and had been expressly rejected by the trial court because it was contradicted by other record evidence and because it did not relate to the time period when petitioners supposedly had a duty to make such a disclosure. Further illustrating the majority's loose approach

The Eleventh Circuit's non-deferential approach contravenes the standards for appellate review established by this Court. When determining mixed questions of law and fact under the securities and commodities laws – such as whether speech is misleading – "the underlying objective facts, which will often be free from dispute, are *merely the starting point* for the ultimate determination of … the inferences a 'reasonable [person]' would draw from a given set of facts." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (emphasis added) (reversing a court of appeals for determining materiality "as a matter of law"); *see also, e.g., Isquith v. Middle South Utils., Inc.*, 847 F.2d 186, 210-11 (5th Cir. 1988) (holding that "whether information has been adequately disclosed is a mixed question of fact and law and, therefore, is a question for a jury"). Thus, the trial court's judgment should have been affirmed unless "reasonable minds could not differ" in concluding that the statements "taken together and in context, were misleading." *Silver v. H&R Block, Inc.*, 105 F.3d 394, 396 (8th Cir. 1997). But as made clear by the opinion of the trial court and Judge Wilson's dissent, that standard was not met here.

The approach adopted below is also inconsistent with the law applicable to misleading speech under the Lanham Act. "Unlike the requirements of a claim of literal falsity, the plaintiff alleging a misleading advertisement has the burden of proving that a substantial portion of the audience for that advertisement was actually misled." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 36 (1st Cir. 2000). In such cases, literally true statements can virtu-

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to the record, Judge Tjoflat's concurring opinion explains that the statement "only investment capital should be used" does not sufficiently disclose risk. Pet. App. 24a. The commercial actually said "only *risk* capital should be used," meaning money that the trader could afford to lose. Pet. App. 35a (Wilson, J., dissenting).

ally never be deemed misleading "as a matter of law"; rather, a plaintiff must present extrinsic evidence, such as a consumer survey or substantial witness testimony, establishing an actual tendency to deceive. *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 497 (5th Cir. 2000); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 616 (6th Cir. 1999). By permitting a court to find a television commercial misleading as a matter of law based solely on its text, the decision below threatens to unravel the settled body of law applicable to literally true advertising.

III. THE DECISION BELOW INVOLVES IMPORTANT AND RECURRING QUESTIONS OF FEDERAL LAW THAT MERIT THIS COURT'S IMMEDIATE REVIEW

A. The Questions Raised Are Critical to a Host of Commodities and Securities Actions

The issues presented by this case are plainly of recurring importance. Both scienter and misrepresentation are essential elements of fraud claims under the securities and commodities laws. As such, the proper treatment of these issues is critical in cases brought by the enforcement agencies in federal district courts and in administrative proceedings, *see, e.g., Staryk*, 1997 WL 778236,[10] as well as in private lawsuits, including "the large number of securities-fraud class actions that are filed in federal court." *See* Brief for the United States as Amicus Curiae, On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit,

[10] Indeed, the application of these standards to enforcement actions both in district court and in administrative proceedings highlights the need for review. In light of the subjective approach to scienter adopted by the Commission in *Staryk*, the CFTC's Division of Enforcement may be inclined to shunt cases lacking subjective evidence of intent into the district courts, thus compounding the extent to which the forum determines the outcome.

Dura Pharms. v. Broudo, No. 03-932, at 13-14 (filed May 28, 2004), *cert. granted*, __ U.S. __ (June 28, 2004) (explaining important and recurring nature of questions involving standards for securities fraud).

Under the Eleventh Circuit's standard, fraud liability can be imposed without regard to whether a defendant understood that his speech was misleading or whether there was any evidence that any listener actually was misled. Absent resolution by this Court, defendants in some circuits can essentially be found guilty of *inadvertently* committing fraud, while defendants in other circuits must be found to have had subjective culpability. Moreover, under the Eleventh Circuit's duty-to-disclose analysis, potential defendants must not only avoid unwittingly saying something that might later be deemed misleading, but also attempt to guess, and make sure they *do* say, anything a district court or appellate court might later conclude that listeners would want to know.

The Eleventh Circuit's determination of scienter and misrepresentations as a matter of law based solely on the language of petitioners' promotions also undermines substantial procedural protections by rendering irrelevant the entire course of a three-week bench trial. In the wake of the decision, a district court encountering an allegation that a particular advertisement or promotion is misleading will be faced with an intractable choice. On the one hand, the decision below suggests that the court can simply review the advertisement itself and determine whether, based on its own understanding of precedent, the advertisement is misleading. On the other hand, this Court's decision in *TSC Industries* indicates that the advertisement itself is "merely the starting point," and that the court should admit and weigh a variety of other evidence. District courts should not be put to this choice of prematurely granting summary judgment versus holding a lengthy trial only to have it later deemed unnecessary. Accordingly, this Court's guidance is necessary.

B. This Case Presents an Appropriate Vehicle To Resolve These Important Questions of Law

This case presents an excellent vehicle for addressing the issues raised. Unlike many other cases arising in this area, here there are no disputed questions of fact. At oral argument before the Eleventh Circuit, the CFTC expressly waived any claim that the trial court's findings were clearly erroneous, and the majority opinion makes clear that it reached its conclusions notwithstanding the trial court's unchallenged findings of fact.

Because the trial court's findings regarding petitioners' subjective state of mind are intact and uncontroverted, this case squarely presents the legal issues in a context that permits this Court to establish the appropriate standard for scienter. The only way the court of appeals' decision can stand is if it is no defense to commodities fraud, as a matter of law, that petitioners acted in good faith and honestly believed that their promotions were not misleading but lawful.

The same is true regarding the standards for assessing whether speech is misleading. Because what is at issue is the court of appeals' determination that the promotions were misleading as a matter of law, without even considering the uncontroverted evidence presented at trial to the contrary, it is not necessary for this Court to embroil itself in factual matters in order to resolve the proper mode of analysis. Similarly, the Court need only address the legal question whether a broker has a duty to disclose all information, not otherwise required by statute or rule, that "a reasonable investor *surely* would want to know," or if that duty arises only when the information is linked to a specific contrary representation. This case thus presents an excellent opportunity for the Court to address both the deference due a trial court's factual findings as to whether speech is misleading and the standards determining what information must be disclosed.

C. To Avoid Chilling Commercial Speech, the Court Should Resolve These Issues Now

Vague standards for fraud liability create the risk of punishing well-intentioned speech that is only later determined to be misleading, and of chilling speech that is, in fact, not misleading. The decision below contributes to the vagueness of the already "arbitrary and conflicting" body of law on commodities fraud, and "fails to offer any useful guidance to actors in this area." Pet. App. 43a. Thus, as the dissent warned, "[c]ommodities brokerage firms should be on the alert – this decision may make it difficult to advertise and solicit business in the future." Pet. App. 44a.

The approach adopted by the Eleventh Circuit threatens to retroactively punish legitimate commercial speech, undertaken in good faith but later deemed misleading. By taking the question of whether speech is misleading out of the hands of the factfinder and resolving the issue as a matter of law, the Eleventh Circuit removed an important protection available to brokers engaged in commercial speech. Rather than being able to present testimonial and documentary evidence demonstrating how their speech would be understood by the relevant audience, brokers will face a federal judge simply reviewing the bare text of a challenged advertisement or promotion and deeming it misleading or not as he or she sees fit. Given the potentially serious consequences of such a determination – including substantial fines and a permanent ban from engaging in the commodities or securities business – brokers will be encouraged to steer clear of legitimate advertising. This runs contrary to the intent of Congress; as the Court has recognized, "speculators" or "investors" are key to the existence of sustainable commodities markets, because such speculators "broaden a market" to make possible the execution of larger orders by commercial hedgers with minimum price disturbance. *Curran*, 456 U.S. at 359, 360 n.11 (citing H.R. Rep. No. 93-975, at 138 (1974)).

The Eleventh Circuit's treatment of scienter exacerbates

the potential chilling effect of its decision by imposing liability even on those who attempt in good faith to comply with the law. Indeed, a scienter requirement often "may mitigate a law's vagueness." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). However, the fact that petitioners were held liable for fraud "after studying [the law] and making a conscious effort at compliance" demonstrates that the approach adopted by the Eleventh Circuit creates "a trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). Accordingly, the Eleventh Circuit's approach to the relevant statutes creates inappropriate risks of arbitrary or selective enforcement. *Id*.

Under the Eleventh Circuit's decision, careful and well-intentioned commodities brokers who seek only to comply with the law will be unable to do so with any certainty. They may be chilled from advertising altogether for fear that, like petitioners, they too may have their lives ruined by being charged with, and found guilty of, *inadvertently* committing fraud. By reaching out to reverse the judgment of the trial court, the Eleventh Circuit unnecessarily propelled the law into an area of constitutional peril. Given the potential of the Eleventh Circuit's approach to chill legitimate commercial speech, the Court should not delay in resolving these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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