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No. 92-854

In The
Supreme Court of the United States
October Term, 1992

CENTRAL BANK OF DENVER, N.A.,
Petitioner,
vs.

FIRST INTERSTATE BANK OF DENVER, N.A. and
JACK K. NABER,
Respondents.

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

BRIEF OF AMICUS CURIAE TRIAL LAWYERS
FOR PUBLIC JUSTICE, P.C. AND UNITED STATES
PUBLIC INTEREST RESEARCH GROUP IN
SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether there is a private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.
2. Whether recklessness satisfies the scienter requirement for aiding and abetting.

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| <i>Braswell v. United States</i> , 487 U.S. 99 (1988) | 22 |
| <i>Brennan v. Midwestern Life Ins. Co.</i> , 259 F.Supp. 673 (N.D. Ind. 1966), <i>aff'd</i> , 417 F.2d 147 (7th Cir. 1969), <i>cert. denied</i> , 397 U.S. 989 (1970) | 3, 10, 12 |
| <i>Broad v. Rockwell Int'l Corp.</i> , 642 F.2d 929 (5th Cir.), <i>cert. denied</i> , 454 U.S. 965 (1981) | 14 |
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| <i>Cooper v. Schlesinger</i> , 111 U.S. 148 (1884) | 14 |
| <i>Derry v. Peek</i> , 14 App. Cas. 337 (1889) | 15 |

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| <i>Director of OTS v. Ernst & Young</i> , 786 F. Supp. 46 (D.D.C. 1992)..... | 26 |
| <i>Dirks v. SEC</i> , 681 F.2d 824 (D.C. Cir. 1982), <i>rev'd on other grounds</i> , 463 U.S. 646 (1983) | 14 |
| <i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976).. <i>passim</i> | |
| <i>FDIC v. First Interstate Bank, N.A.</i> , 885 F.2d 423 (8th Cir. 1989)..... | 11 |
| <i>First Interstate Bank of Denver, N.A. v. Pring</i> , 969 F.2d 891 (10th Cir. 1992), <i>cert. granted sub nom. Central Bank of Denver, N.A. v. First Interstate Bank, N.A.</i> , 113 S.Ct. 2927 (1993)..... | 2 |
| <i>Fry v. Schumacher</i> , 83 F. Supp. 476 (E.D. Pa. 1947) | 10 |
| <i>Gaffin v. Teledyne, Inc.</i> , 611 A.2d 467 (Del. 1992) | 23 |
| <i>Gould v. American-Hawaiian S.S. Co.</i> , 535 F.2d 761 (3d Cir. 1976) | 11 |
| <i>Hackbart v. Holmes</i> , 675 F.2d 1114 (10th Cir. 1982) | 14 |
| <i>Halberstam v. Welch</i> , 705 F.2d 472 (D.C. Cir. 1983) | 3 |
| <i>Herm v. Stafford</i> , 663 F.2d 669 (6th Cir. 1981) | 11 |
| <i>Herman & MacLean v. Huddleston</i> , 459 U.S. 375 (1983) | 5, 10 |
| <i>Hirsch v. Du Pont</i> , 553 F.2d 750 (2d Cir. 1977) | 11 |
| <i>Hollinger v. Titan Capital Corp.</i> , 914 F.2d 1564 (9th Cir. 1990), <i>cert. denied</i> , 111 S.Ct. 1621 (1991)..... | 14 |
| <i>IIT v. Cornfeld</i> , 619 F.2d 909 (2d Cir. 1980)..... | 4 |
| <i>In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.</i> , 794 F. Supp. 1424 (D. Ariz. 1992) | 16, 19, 22, 24, 28, 29 |

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| <i>In re Barry L. Lefko</i> , 47 S.E.C. 373 (Sept. 30, 1980) | 12 |
| <i>In re Equity Funding Corp. of Amer. Sec. Litig.</i> , 416 F. Supp. 161 (C.D. Cal. 1976) | 12 |
| <i>In re The Drexel Burnham Lambert Group, Inc.</i> , No. 92-5032, 1993 U.S. App. LEXIS 12445 (2d Cir. 1993) | 20 |
| <i>Investors Research Corp. v. SEC</i> , 628 F.2d 168 (D.C. Cir.), cert. denied, 449 U.S. 919 (1980) | 11 |
| <i>Kardon v. National Gypsum Co.</i> , 69 F.Supp. 512 (E.D. Pa. 1946) | 10 |
| <i>Keating v. National Union Fire Ins. Co.</i> , No. 90-56265, 1993 U.S. App. LEXIS 12998 (9th Cir. 1993) | 22 |
| <i>Kerbs v. Fall River Indus., Inc.</i> , 502 F.2d 731 (10th Cir. 1974) | 11 |
| <i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 111 S.Ct. 2773 (1991) | 5 |
| <i>Lincoln Sav. & Loan Ass'n v. Wall</i> , 743 F. Supp. 901 (D.D.C. 1990) | 26 |
| <i>Mansbach v. Prescott, Ball & Turben</i> , 598 F.2d 1017 (6th Cir. 1979) | 14 |
| <i>Mirkin v. Wasserman</i> , 12 Cal. App. 4th 927, 278 Cal. Rptr. 729, review granted, 1991 Cal. LEXIS 2850, 282 Cal. Rptr. 840, 811 P.2d 1024 (1991) | 23 |
| <i>Mishkin v. Peat, Marwick, Mitchell & Co.</i> , 658 F. Supp. 271 (S.D.N.Y. 1987) | 16 |
| <i>Musick, Peeler & Garrett v. Employers Ins. of Wausau</i> , 113 S.Ct. 2085 (1993) | <i>passim</i> |

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| <i>Nye & Nissen v. United States</i> , 336 U.S. 613 (1949) | 4 |
| <i>Peil v. Speiser</i> , 806 F.2d 1154 (3d Cir. 1986) | 23 |
| <i>Pettit v. American Stock Exchange</i> , 217 F. Supp. 21 (S.D.N.Y. 1963) | 10 |
| <i>Randall v. Loftsgaarden</i> , 478 U.S. 647 (1986) | 5 |
| <i>Robin v. Arthur Young & Co.</i> , 915 F.2d 1120 (7th Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991) | 13 |
| <i>Rolf v. Blyth, Eastman Dillon & Co.</i> , 570 F.2d 38 (2d Cir.), cert. denied, 439 U.S. 1039 (1978) | 14 |
| <i>Ruthenberg v. United States</i> , 245 U.S. 478 (1918) | 9 |
| <i>SEC v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180 (1963) | 7 |
| <i>SEC v. Milken</i> , [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,200 (S.D.N.Y. 1990) | 20 |
| <i>SEC v. Seaboard Corp.</i> , 677 F.2d 1301 (9th Cir. 1982) ..4, | 11 |
| <i>SEC v. Timetrust, Inc.</i> , 28 F. Supp. 34 (N.D. Cal. 1939) | 11 |
| <i>Sharp v. Coopers & Lybrand</i> , 649 F.2d 175 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982) | 14 |
| <i>Stokes v. Lokken</i> , 644 F.2d 779 (8th Cir. 1981) | 14 |
| <i>Sundstrand Corp. v. Sun Chem. Corp.</i> , 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875 (1977) | 14, 15 |
| <i>United States v. Arthur Young & Co.</i> , 465 U.S. 805 (1984) | 30 |

TABLE OF AUTHORITIES - Continued

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| <i>United States v. Benjamin</i> , 328 F.2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964) | 27 |
| <i>United States v. Chiarella</i> , 588 F.2d 1358 (2d Cir. 1978), rev'd on other grounds, 445 U.S. 222 (1980) | 3 |
| <i>United States v. Feola</i> , 420 U.S. 684 (1975)..... | 16 |
| <i>United States v. Frank</i> , 520 F.2d 1287 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976) | 15 |
| <i>United States v. Gay</i> , 967 F.2d 322 (9th Cir.), cert. denied, 113 S.Ct. 359 (1992) | 15 |
| <i>United States v. Kessi</i> , 868 F.2d 1097 (9th Cir. 1989) | 4 |
| <i>United States v. Milken</i> , 759 F.Supp. 109 (S.D.N.Y. 1990)..... | 20 |
| <i>United States v. Naftalin</i> , 441 U.S. 768 (1979)..... | 6, 7 |
| <i>United States v. Natelli</i> , 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976) | 15 |
| <i>United States v. Re</i> , 336 F.2d 306 (2d Cir. 1964), cert. denied, 379 U.S. 904 (1964)..... | 4 |
| <i>United States v. Sellers</i> , 871 F.2d 1019 (11th Cir. 1989)..... | 9 |
| <i>United States v. Simon</i> , 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970) | 15 |
| <i>United States v. Tejada</i> , 956 F.2d 1256 (2d Cir.), cert. denied, 113 S.Ct. 334 (1992) | 4 |
| <i>United States v. Weiner</i> , 578 F.2d 757 (9th Cir.), cert. denied, 439 U.S. 981 (1978) | 15 |

TABLE OF AUTHORITIES – Continued

| | Page |
|-----------------------------------------------------------------------------------------------------|---------------|
| <i>Virginia Bankshares, Inc. v. Sandberg</i> , 111 S.Ct. 2749 (1991)..... | 15 |
| <i>Woods v. Barnett Bank</i> , 765 F.2d 1004 (11th Cir. 1985)..... | 14 |
| STATUTES, RULES AND REGULATIONS | |
| 17 C.F.R. | |
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| § 332, 35 Stat. 1152 (formerly 18 U.S.C. § 550) | 4 |
| 77 Cong. Rec. 2914 (1933)..... | 6, 7 |
| 77 Cong. Rec. 2925 (1933)..... | 7 |
| 77 Cong. Rec. 2939-40 (1934)..... | 6 |
| 77 Cong. Rec. 3801 (1933)..... | 7 |
| 77 Cong. Rec. 937 (1933)..... | 7 |
| H.R. Rep. No. 355, 98th Cong., 1st Sess. at 10 (1983), reprinted in 1984 U.S.C.C.A.N. 2274 | 9 |
| Insider Trading Sanctions Act of 1984, Pub. L. 98-376..... | 9 |
| 15 U.S.C. | |
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| § 78i | 12 |
| § 78j(b)..... | 3 |
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| 18 U.S.C. | |
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| § 9..... | 12 |
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| SECONDARY AUTHORITIES | |
| 4 A. Bromberg & L. Lowenfels, <i>Securities Fraud & Commodities Fraud</i> , § 8.5(610)..... | 11 |
| 5 A. Jacobs, <i>The Impact of Rule 10b-5 § 2</i> (1980) | 4 |
| A. Stevens & P. Thomas, <i>How a Big Law Firm Was Brought to Knees By Zealous Regulators</i> , Wall St. J., Mar. 13, 1992..... | 28 |
| 2 AICPA, <i>Professional Standards</i> , § 53 | 17 |
| Aldave, "Neither Unusual nor Unfortunate": <i>The Overlap of Rule 10b-5 with the Express Liability Sections of the Securities Acts</i> , 60 Tex. L. Rev. 714 (1982) | 16 |
| 1985 Atty. Gen. Ann. Rep. 42 | 18 |
| Bromberg & Lowenfels, <i>Aiding and Abetting Securities Fraud: A Critical Examination</i> , 52 Alb. L. Rev. 637 (1988)..... | 4 |
| C. Harlan, <i>Coopers & Lybrand Agrees to Payment of \$95 Million in the MiniScribe Case</i> , Wall St. J., Oct. 30, 1992 | 30 |
| Cox, <i>Just Why Did Jones Day Settle?</i> , Nat'l L.J., Apr. 13, 1992..... | 28 |
| D. Ratner, <i>Securities Regulation</i> § 11, at 80 (2d ed. 1982)..... | 7 |
| Departments of Commerce, Justice, and State, <i>the Judiciary, and Related Agencies Appropriations for 1990: Hearings Before a Subcomm. of the House Comm. on Appropriations</i> , 101st Cong., 1st Sess., pt. 6 (1989)..... | 6 |

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Drug Enforcement: Hearing on H.R. 526 Before Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986)</i> | 18 |
| E. Morris, <i>The Rise of Theodore Roosevelt</i> 193 (Ballantine ed. 1979)..... | 22 |
| <i>Examination and Supervision of Depository Institutions: Hearings Before the House Comm. on Banking Finance and Urban Affairs, 101st Cong., 1st Sess. 21 (1989)</i> | 21 |
| Ferrara & Sanger, <i>Derivative Liability in Securities Law: Controlling Person Liability, Respondeat Superior, and Aiding and Abetting</i> , 40 Wash. & Lee L. Rev. 1007 (1983)..... | 13 |
| France, <i>Savings & Loan Lawyers</i> , 77 A.B.A.J. 52 (May 1991)..... | 26 |
| Frankel, <i>Implied Rights of Action</i> , 67 Va. L. Rev. 553 (1981)..... | 5 |
| Freeman & Crystal, <i>Scienter in Professional Liability Cases</i> , 42 S.C.L. Rev. 783 (1991)..... | 15 |
| GAO, <i>CPA Audit Quality: Failures of CPA Audits to Identify and Report Significant Savings and Loan Problems</i> , 1 (1989)..... | 25 |
| General Accounting Office (GAO), <i>Foreign Bank – Initial Assessment of Certain BCCI Activities in the U.S.</i> (1992)..... | 19 |
| Granelli, <i>Keating Trial Focuses on Advisers</i> , L.A. Times, Mar. 14, 1992..... | 29 |
| H. Edelhertz, <i>The Nature, Impact and Prosecution of White-Collar Crime</i> , 9 (1970)..... | 21 |
| Harris, <i>The S&L Looters Who May Get Away</i> , Wall St. J., Feb. 12, 1990..... | 25 |

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| <i>Int'l Accounting Data Book</i> , (Lafferty Business Research 1992) | 30 |
| J. Cotchett & S. Pizzo, <i>The Ethics Gap</i> (1991) | 17 |
| J. Granelli, <i>Getting Their Day in Court</i> , L.A. Times, Mar. 1, 1992..... | 28 |
| J. Seligman, <i>The Transformation of Wall Street</i> , 79 (1983) | 8 |
| Jackson, <i>FBI Probe Focuses on Senators' Ties to Keating's S&L</i> , Wall St. J., Nov. 13, 1989..... | 29 |
| Jackson, <i>New Disclosures of Riegle's Lincoln Role Suggest He Was More Than a Bystander</i> , Wall St. J., Nov. 15, 1989..... | 29 |
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| Jensen, <i>Jones Day: Behind the Settlement</i> , Nat'l L.J., July 5, 1993 | 28 |
| "Junk Bond" Leader is Indicted by U.S. in Criminal Action, N.Y. Times, Mar. 30, 1989 | 20 |
| K. Bacon & L. Berton, <i>Ernst to Pay \$400 Million Over Audit of Four Big Thrifts</i> , Wall St. J., Nov. 24, 1992..... | 29 |
| Kuehnle, <i>Secondary Liability Under the Federal Securities Laws – Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme</i> , 1988 J. Corp. L. 313..... | 13 |
| Landis, <i>The Legislative History of the Securities Act of 1933</i> , 28 Geo. Wash. L. Rev. 29 (1959) | 8 |

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| | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Langevoort, <i>Fraud and Deception by Securities Professionals</i> , 61 Tex. L. Rev. 1247 (1983)..... | 17 |
| <i>Law Firm in Lincoln S&L Suit Agrees to Pay \$20 Million</i> , S.F. Chron., June 16, 1990..... | 27 |
| M. Freudenheim, <i>U.S. Jury Awards \$3.3 Billion to Investors From Keating</i> , N.Y. Times, July 11, 1992 | 20 |
| M. Sullivan, <i>Our Times: The United States – America Finding Herself</i> , 386 (1927) | 22 |
| McCoy, Schmit & Bailey, <i>Hall of Shame: Besides S&L Owners, Host of Professionals Paved Way in Crisis</i> , Wall St. J., Nov. 2, 1990 | 27 |
| <i>Most Common Causes of Claims in AICPA Liability Insurance</i> , Accounting Today, July 20, 1992 | 30 |
| Nat'l Comm'n on Fraudulent Financial Reporting, <i>Report of the Nat'l Commission on Fraudulent Financial Reporting</i> , 4 (1987)..... | 25 |
| Note, <i>A Complicity-Doctrine Approach to Section 10(b) Aiding and Abetting Civil Damages Actions</i> , 89 Colum. L. Rev. 180 (1989) | 11 |
| Note, <i>Are the Accountants Liable? Auditor Liability in the Savings and Loan Crisis</i> , 25 Ind. L. Rev. 475 (1991)..... | 26 |
| Note, <i>"Controlling" Securities Fraud; Proposed Liability Standards for Controlling Persons Under the 1933 and 1934 Securities Acts</i> , 72 Minn. L. Rev. 930 (1988)..... | 9 |
| Note, <i>Establishment of Liability for Aiding and Abetting Fraud Under Rule 10b-5 and the Common Law</i> , 25 UCLA L. Rev. 862 (1978) | 16 |

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| Note, <i>Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?</i> , 64 Notre Dame L. Rev. 222 (1989) | 21 |
| Note, <i>Liability for Aiding and Abetting Violations of Rule 10b-5; The Recklessness Standard in Civil Damage Actions</i> , 62 Tex. L. Rev. 1087 (1984) | 12, 14, 16, 17, 22 |
| Note, <i>Securities Attorneys Face Liability For Wrongs of Their Corporate Clients</i> , 5 J. of Legal Comment. 403 (1990) | 27 |
| Office of Comptroller of Currency, <i>Bank Failure: An Evaluation of the Factors Contributing to the Failure of National Banks</i> , 9 (1988) | 21 |
| President's Commission on Law Enforcement and Administration of Justice, <i>The Challenge of Crime in a Free Society</i> 33-34 (1967) | 21 |
| Public Citizen/USPIRG, <i>Bad Audits . . . Not Deep Pockets: Illustrations of Failed Audits by the Big 6</i> 7-8 (1993) | 18 |
| R. Jennings & H. Marsh, <i>Securities Regulation</i> 23 (5th ed. 1982) | 22 |
| Restatement (2d) of Torts, § 526, comment e (1977) | 15 |
| Restatement (Second) of Torts § 876(b) (1979) | 3 |
| Ruder, <i>Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution</i> , 120 U. Pa. L. Rev. 597 (1972) | 11, 13 |

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| Ruder, <i>The Development of Legal Doctrine Through Amicus Participation: The SEC Experience, 1989</i> Wis. L. Rev. 1167..... | 6 |
| S. Labaton, <i>\$400 Million Bargain for Ernst</i> , N.Y. Times, Nov. 25, 1992 | 30 |
| Statement of Prof. Arthur R. Miller On H.R. 3185 <i>Before the Subcomm. on Telecommunications and Finance, House Comm. on Energy and Commerce</i> (Nov. 21, 1991) | 24 |
| Subcommittee on Terrorism, Narcotics and International Operations, <i>The BCCI Affair: A Report to the Senate Comm. on Foreign Relations</i> (1992) | 19 |
| Thomas, <i>Regulators Cite Delays and Phone Bugs in Examination, Seizure of Lincoln S&L</i> , Wall St. J., Oct. 27, 1989 | 29 |
| U.S., <i>A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss</i> , 6 (1974)..... | 17 |
| W. Getler, <i>Insiders Often Dump Shares Long Before Concerns Enter Bankruptcy, Study Says</i> , Wall St. J., July 7, 1993 | 20 |
| W. Page Keeton, et al., <i>Prosser & Keeton on the Law of Torts</i> , § 107, at 741-42 (5th ed. 1984)..... | 15 |
| <i>White Collar Crime (E.F. Hutton): Hearings Before the Senate Judiciary Committee, 98th Cong., 2d Sess.</i> 132 (1986)..... | 18, 20 |

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FIRST INTERSTATE BANK OF DENVER, N.A. and
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On Writ Of Certiorari To The
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BRIEF OF AMICUS CURIAE TRIAL LAWYERS
FOR PUBLIC JUSTICE, P.C. AND UNITED STATES
PUBLIC INTEREST RESEARCH GROUP IN
SUPPORT OF RESPONDENTS

I. INTRODUCTION AND INTEREST OF AMICUS
CURIAE¹

Trial Lawyers for Public Justice, P.C. (TLPJ) and United States Public Interest Research Group (USPIRG) are, respectively, a public interest law firm and a consumer advocacy organization which represent victims of fraud and misconduct. USPIRG is the national lobbying office for state Public Interest Research Groups (PIRGs) located in 31 states. State PIRGs are non-profit, non-

¹ This *amicus curiae* brief is filed pursuant to consent letters provided by counsel for Petitioner and Respondents.

partisan research and advocacy organizations with more than one million members.

The anti-fraud provisions of the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) and rules and regulations promulgated thereunder by the Securities and Exchange Commission (SEC) are among the few effective remedies available to victims of fraud. TLPJ and USPIRG advocate continued recognition that the private right of action under § 10(b) of the Exchange Act and SEC Rule 10b-5 encompass aiding and abetting liability. This result is consistent with the Exchange Act's statutory language, construction and public policy which compelled its enactment and motivates its interpretation. Further, TLPJ and USPIRG believe that *recklessness* is the appropriate level of scienter for aiding and abetting liability and that the decision of the court below should be affirmed.²

II. ARGUMENT

A. Recognition Of Aiding And Abetting Liability Is Consistent With The Language Of § 10(b) And Rule 10b-5, Which Were Designed To Protect Investors And Deter Securities Fraud

"The starting point in every case involving construction of a statute is the language itself."³ Section 10(b) and Rule 10b-5 state that it is "unlawful" for "any person" to engage in deceptive or manipulative acts or practices.⁴ A violation of either provision is a

² The decision of the court below is reported as *First Interstate Bank of Denver, N.A. v. Pring*, 969 F.2d 891 (10th Cir. 1992), cert. granted sub nom. *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 113 S. Ct. 2927 (1993).

³ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

⁴ Section 10(b) makes it "unlawful for any person" to use or employ "any manipulative or deceptive device or contrivance"

*crime*⁵ and aider and abettor liability is recognized under the common law of tort⁶ and federal criminal law,⁷ where

in connection with the purchase or sale of any security and empowers the SEC to prescribe necessary and appropriate rules and regulations "in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added). Rule 10b-5 makes it "unlawful for any person" to "employ any device, scheme, or artifice to defraud," make misleading representations or omissions, or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5 (emphasis added). Taken together, "[t]he sweeping words of § 10(b) and Rule 10b-5 ban manipulation, deception, or fraud in the purchase or sale of securities. '[A]ny person' who engages in such activity merits condemnation under the statute and the rule." *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2094 (1993) (Thomas, Blackmun and O'Connor, JJ., dissenting).

⁵ See 15 U.S.C. § 78ff (criminal liability for violations of securities laws); *United States v. Chiarella*, 588 F.2d 1358, 1368 n.16 (2d Cir. 1978) ("It is well-established that, except for issues of intent and burden of proof, criminal and civil liability under the securities laws are coextensive."), *rev'd on other grounds*, 445 U.S. 222 (1980).

⁶ The *Restatement (Second) of Torts* § 876(b) (1979) imposes liability for harm to a third party if the person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . ." In civil damage actions, the courts created the aiding and abetting cause of action largely by analogy to tort theories. See, e.g., *Brennan v. Midwestern Life Ins. Co.*, 259 F. Supp. 673, 680 (N.D. Ind. 1966) (noting that the *Restatement* principles "surely best fulfill the purposes of the [Exchange Act]"), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); see also *Halberstam v. Welch*, 705 F.2d 472, 477-78, 481-86 (D.C. Cir. 1983).

⁷ 18 U.S.C. § 2(a) provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

the roots of the § 10(b) aiding and abetting cause of action lie.⁸ Under 18 U.S.C. § 2(a), aiding and abetting a violation of § 10(b) is a violation of § 10(b). Moreover, aiding and abetting securities fraud is precisely the kind of deceptive practice which § 10(b) was designed to prohibit.⁹

This construction is consistent with § 10(b)'s purpose to protect investors from fraudulent practices in the

See United States v. Tejada, 956 F.2d 1256, 1265 (2d Cir.) (to convict a defendant as an aider and abettor, government need show only " 'that [a defendant] in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wish[ed] to bring about, that he [sought] by his action to make it succeed'" ; conviction may be upheld "even if a defendant did not participate 'in every phase of the criminal venture,' or have a 'stake in the outcome of the illegal venture.' ") (citations omitted), *cert. denied*, 113 S. Ct. 334 (1992); *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Federal criminal aiding and abetting liability was codified 25 years before the Exchange Act was enacted, *see* Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (formerly 18 U.S.C. § 550).

⁸ *See SEC v. Seaboard Corp.*, 677 F.2d 1301, 1311 (9th Cir. 1982) ("Tort and criminal theories have supported the implication of aider and abettor . . . liability."); *accord Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1127 (5th Cir. 1988), *vacated in part on other grounds*, 492 U.S. 918 (1989); *IIT v. Cornfeld*, 619 F.2d 909, 922 & n.15 (2d Cir. 1980); *see also* 5 A. Jacobs, *The Impact of Rule 10b-5* § 2, at 1-5 (1980) ("Common law has an important bearing on [Rule] 10b-5 because courts discussing the Rule frequently analogized to tort concepts").

⁹ As Petitioner concedes, *see* Brief for Pet. at 20, 18 U.S.C. § 2(a) reaches aiders and abettors of criminal violations of the securities laws. *See United States v. Kessi*, 868 F.2d 1097, 1103 (9th Cir. 1989) (affirming defendant's conviction for aiding and abetting § 10(b) violations); *United States v. Re*, 336 F.2d 306, 318 (2d Cir. 1964) (same), *cert. denied*, 379 U.S. 904 (1964); Bromberg & Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 Alb. L. Rev. 637, 766 (1988).

securities markets¹⁰ and serve as “a comprehensive anti-fraud provision operating even when more specific laws have no application.”¹¹ Congress’ aim “in enacting the [Exchange] Act was not confined solely to compensating defrauded investors”; rather, “Congress intended to *deter fraud and manipulative practices* in the securities markets, and to ensure full disclosure of information material to invest[ors].”¹² Rules facilitating § 10(b) litigation “support[] the congressional policy embodied in the [Exchange] Act” of combating all forms of securities fraud.¹³ Although Congress gave the SEC primary enforcement responsibility, private suits constitute “an essential tool for enforcement of the [Exchange] Act’s requirements”¹⁴ and are “a necessary supplement to

¹⁰ See *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (“The [Exchange] Act was designed to protect investors against manipulation of stock prices.”) (citing S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934)).

¹¹ *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2789 (1991) (Kennedy and O’Connor, JJ., dissenting); see also *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) (referring to “the broad proscription against fraud in § 10(b)”).

¹² *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (emphasis added; citations omitted); accord *Musick, Peeler & Garrett*, 113 S. Ct. at 2090; see also *Herman & MacLean v. Huddleston*, 459 U.S. at 386-87 (primary policy in Exchange Act is the punishment and deterrence of securities violations).

¹³ *Basic, Inc. v. Levinson*, 485 U.S. at 245.

¹⁴ *Id.* at 231; see also Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 556 (1981) (primary purpose behind implied remedies in the securities field has been to deter fraudulent conduct through “an extension of SEC action”).

[SEC] action,'¹⁵ as the SEC has repeatedly acknowledged.¹⁶

Aiding and abetting liability is consistent with public policy underlying the federal securities laws, which were enacted in the wake of the Great Depression to prevent a repeat of the 1929 stock market crash¹⁷ by correcting inadequacies in the information provided by securities issuers to the investing public, deterring fraud and manipulation and restoring confidence in the securities markets,¹⁸ necessary steps suggested by President Roosevelt.¹⁹ The Securities Act and the Exchange Act were

¹⁵ *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

¹⁶ See Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 Wis. L. Rev. 1167, 1168 (observing, as former SEC chairman, that "private securities litigation plays an essential role in federal securities regulation"); see also *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1990: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 101st Cong., 1st Sess., pt. 6, at 208-09 (1989) (Statement of SEC chairman Ruder reporting that investor complaints, "which have increased significantly in recent years . . . are a traditional indicator of potential fraud. In 1987, the [SEC] received over 40,000 complaints and inquiries from investors, over 230% the number received in 1982.").

¹⁷ See *United States v. Naftalin*, 441 U.S. 768, 775 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. at 194.

¹⁸ See 77 Cong. Rec. 2914 (1933) (remarks of Rep. Greenwood), reprinted in 1 J. Ellenberger & E. Mahar, *Legislative History of the Securities Act of 1933 and the Securities Exchange Act of 1934*, Item 7 (1973) (*Legislative History*); 77 Cong. Rec. 2939-40 (1934) (remarks of Rep. Koppleman), reprinted in 1 *Legislative History*, Item 7.

¹⁹ In a special message to Congress, President Roosevelt called attention to the fragile state of financial institutions, stressing the need to deter securities fraud. He stated that secu-

enacted to combat securities fraud because state law was inadequate²⁰ to remedy the absence of business ethics on Wall Street.²¹

Professionals who seek to “reform” the securities laws and obtain immunity from liability for fraud and manipulation are direct descendants of critics in the 1930s who sought to repeal or modify the Securities Act and the Exchange Act, arguing that the legislation was so “draconian” that it would “dry up the nation’s underwriting business and that ‘grass would grow on Wall Street.’”²²

curities legislation “should give impetus to honest dealing in securities and thereby bring back public confidence,” and observed that “the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities.” 77 Cong. Rec. 937 (1933), reprinted in 1 *Legislative History*, Item 3.

²⁰ See 77 Cong. Rec. 3801 (1933) (remarks of Sen. Fletcher: Securities Act is “designed to protect the public from financial racketeering of . . . investment bankers . . .”); 77 Cong. Rec. 2914 (1933), reprinted in 1 *Legislative History*, Item 7 (remarks of Rep. Mapes: “[M]any of the leading bankers in the country no longer have the old-time sense of ethics or [pay] attention to the strict detail of honest business like the bankers of a former day. . . . The sale of . . . securities has reached a point where it is a scandal and a gigantic racket in America, and the Federal Government is the agency to stop it.”).

²¹ See *United States v. Naftalin*, 441 U.S. at 775-76; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963); 77 Cong. Rec. 2925 (1933) (remarks of Rep. Kelly: “honest and legitimate industry . . . has been . . . made the victim of greedy and ruthless investment bankers”), reprinted in 1 *Legislative History*, Item 7; R. Jennings & H. Marsh, *Securities Regulation* 23 (5th ed. 1982) (*Securities Regulation*) (same).

²² D. Ratner, *Securities Regulation* § 11, at 80 (2d ed. 1982). Justice Felix Frankfurter, then a professor and one of the leading spokesmen for the Securities Act, wrote that “[t]he leading financial law firms who have been systematically carrying on a campaign against [the Securities Act] have been seeking – now

These statutes targeted errant professionals, who were properly held responsible for the celebrated excesses of the 1920s,²³ and they encountered both open and under-cover resistance.²⁴ In the end, Congress passed President

that they and their financial clients have come out of their storm cellar of fear – not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the boldest abuses of fiduciary responsibility. . . . ” J. Seligman, *The Transformation of Wall Street* 79 (1983) (*Transformation*) (quoting letter from Felix Frankfurter to Henry Stimson (Dec. 19, 1933)).

²³ Professor James Landis, the leading historian of the federal securities laws, has written that the Securities Act “naturally had its beginnings in the high financing of the Twenties that was followed by the market crash of 1929” and the “spectacularly illuminating investigation of the nature of this financing” undertaken by the Senate Banking and Currency Committee under the direction of counsel Ferdinand D. Pecora. “The Committee spread on the record more than the peccadillos of groups of men involved in the issuance and marketing of securities. It indicted a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people’s money. Investment bankers, brokers and dealers, corporate directors, accountants, all found themselves the subject of criticism so severe that the American public lost much of its faith in professions that had theretofore been regarded with respect that had approached awe.” Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 30 (1959) (*Securities Act*).

²⁴ Richard Whitney, president of the New York Stock Exchange, led the well-supported fight against securities regulation by the Government. He viewed such legislation as indirectly constituting a nationalization of business, which might result in a freezing of the stock exchange. See J. Seligman, *Transformation*, at 90. In addition, George May of Price Waterhouse & Co. was “opposed to . . . requirements for independent accountants.” Landis, *Securities Act*, 28 Geo. Wash. L. Rev. at 35 n.12.

