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# “MAKE” MEANS “MAKE”: REJECTING THE FOURTH CIRCUIT’S TWO-HEADED INTERPRETATION OF JANUS CAPITAL

C. Steven Bradford\*

## A TRIBUTE TO ALAN BROMBERG

*It's an honor to contribute to this symposium honoring the late Alan Bromberg. Alan was a valuable mentor, a role model, and a friend. If not for Alan, I might not be a law professor today, and I certainly would not have had as good a career.*

*Alan was of counsel to the Dallas law firm I worked for when I graduated from law school, and I had the good fortune to work with him on a couple of cases early in my career. I will never forget his patience, his gentleness, and, above all, his encyclopedic knowledge of federal securities law. It always amazed me that he could immediately point me to relevant cases and articles, sometimes with citations, even when I knew he was out of his office without access to any source materials.*

*When I decided to enter the law teaching market, I turned to Alan for advice. He was instrumental in getting me a visiting position at SMU, where he not only sat in on my class and talked to me about academic issues, but also generously provided a copy of his lengthy business associations teaching notes, a godsend in my first year of teaching. When I applied for a full-time teaching job, Alan served as one of my references and counseled me in choosing among law schools.*

*Many times in the course of my career, Alan provided feedback, served as a reference, offered advice on job opportunities, and generally acted as a mentor. I am forever grateful for what that thoughtful, incredibly gentle man has meant to my career. I will never be the legal scholar (or the person) that Alan was, but his example gives me something to strive for.*

*Alan was the leading expert on Rule 10b-5, so it's only fitting that this article deals with Rule 10b-5.*

## I. INTRODUCTION

**W**HO is liable for securities fraud under Rule 10b-5? The Supreme Court has addressed that question several times over the past twenty-five years, beginning with its rejection of aiding

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and abetting liability in 1994,<sup>1</sup> continuing with its limitation of so-called scheme liability in 2008,<sup>2</sup> and culminating with the 2011 decision on which this article focuses, *Janus Capital Group Inc. v. First Derivative Traders*.<sup>3</sup> *Janus* involved subsection (b) of Rule 10b-5, which makes it unlawful to “make” a false or misleading statement in connection with the purchase or sale of any security.<sup>4</sup> *Janus* held that one makes a statement for purposes of Rule 10b-5(b) only if one has “ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>5</sup> Others involved in the drafting or dissemination of a fraudulent statement are not liable.

Not surprisingly, *Janus* has generated quite a bit of discussion in the lower courts, much of it asking whether *Janus* applies outside of Rule 10b-5(b). Some cases have held that *Janus* does not apply to scheme liability under subsections (a) and (c) of Rule 10b-5.<sup>6</sup> Other cases have held that *Janus* does not apply to actions pursuant to section 17(a) of the Securities Act.<sup>7</sup> Even in cases involving Rule 10b-5(b), courts have wrestled with what exactly it means to have ultimate authority over a false statement. A couple of cases extend *Janus*'s definition of maker beyond any recognizable bounds, but even those cases still claim to be applying *Janus*.<sup>8</sup>

None of those cases challenge the central holding of *Janus*—that, to be liable under Rule 10b-5(b), a defendant must have the ultimate legal authority over the fraudulent statement.<sup>9</sup> Only one case, *Prousalis v. Moore*,<sup>10</sup> has refused to apply the *Janus* definition of “maker” in an action under Rule 10b-5(b). In *Prousalis*, a panel of the Fourth Circuit held that the word “make” in Rule 10b-5(b) must be read differently in crimi-

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1. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 166–201 (1994).

2. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 148–80 (2008).

3. 131 S. Ct. 2296, 2297–2312 (2011).

4. Securities Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b).

5. *Janus*, 131 S. Ct. at 2302.

6. *See, e.g.*, *SEC v. Monterosso*, 557 F. App'x 917, 925 (11th Cir. 2014); *SEC v. Garber*, 959 F. Supp. 2d 374, 380 (S.D.N.Y. 2013); *SEC v. Mercury Interactive, LLC*, 2011 WL 5871020, at \*2 (N.D. Cal. Nov. 22, 2011); *Haw. Ironworkers Annuity Trust Fund v. Cole*, 2011 WL 3862206, at \*5–7 (N.D. Ohio Sept. 1, 2011), *reconsideration denied*, 2013 WL 3147974 (N.D. Ohio June 19, 2013). *But see SEC v. Kelly*, 817 F. Supp. 2d 340, 343–44 (S.D.N.Y. 2011) (holding that *Janus* also applies to scheme liability claims).

7. *See, e.g.*, *SEC v. Big Apple Consulting USA Inc.*, 783 F.3d 786, 795–98 (11th Cir. 2015); *SEC v. Benger*, 931 F. Supp. 2d 904, 905–07 (N.D. Ill. 2013); *SEC v. Stoker*, 865 F. Supp. 2d 457, 464–66 (S.D.N.Y. 2012); *SEC v. Mercury Interactive, LLC*, 2011 WL 5871020, at \*3 (N.D. Cal. Nov. 22, 2011). *But see SEC v. Perry*, 2012 WL 1959566, at \*8 (C.D. Cal. May 31, 2012) (holding that only “makers” are liable under section 17(a)); *SEC v. Kelly*, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) (same).

8. *See SEC v. Garber*, 959 F. Supp. 2d 374, 379–80 (S.D.N.Y. 2013) (holding that the non-attorney defendants were makers of attorneys' opinions prepared at their behest and used by them to sell penny stocks); *In re Nat'l Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828, 862 (S.D. Ohio 2012) (holding that the defendant was a “maker” because it took another company's private placement memoranda and “put them into investors'” hands).

9. *Janus*, 131 S. Ct. at 2299, 2302.

10. 751 F.3d 272, 273–80 (4th Cir. 2014).

nal cases. *Janus* was a private right of action and, according to *Prousalis*, the concerns that led the Supreme Court to limit liability in such cases do not apply to criminal actions.

*Prousalis* is, quite simply, wrong. The majority's analysis in *Janus* was first and foremost based on the text of Rule 10b-5, particularly the use of the word "make." The relevant text is the same whether the government or a private party brings the action. *Prousalis* misunderstands the basic distinction the Supreme Court has made between private rights of action and government actions. The government is not subject to all of the requirements imposed on private plaintiffs, but the substance of the conduct prohibited by Rule 10b-5, including whether the defendant has "made" a false statement, does not depend on who brings the action.

The *Prousalis* majority offers two other arguments to bolster its holding. First, *Prousalis* argues that extending *Janus* to criminal cases would be contrary to notions of judicial restraint and legislative primacy. Second, *Prousalis* points out that no other court has applied *Janus* in a criminal context. Those arguments are specious at best, disingenuous at worst. They provide absolutely no support for the court's conclusion.

"Make" means "make." The word does not magically morph depending on who asserts the claim. A defendant is directly liable under Rule 10b-5(b) only if, in accordance with *Janus*, the defendant has ultimate authority over the fraudulent statement. That is true whether the case is a private right of action, an SEC enforcement action, or a criminal action. If the defendant is not a maker within the meaning of *Janus*, the defendant's liability must lie somewhere outside of Rule 10b-5(b).

## II. A BRIEF REVIEW OF THE TWO CASES

### A. *JANUS* AND THE "MAKER" REQUIREMENT

*Janus* is one of a series of Supreme Court cases, going back at least to the *Blue Chip Stamps* case in 1975,<sup>11</sup> that have limited the scope of Rule 10b-5.<sup>12</sup> *Janus* involved a private action under Rule 10b-5(b), which makes it unlawful, in connection with the purchase or sale of any security, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."<sup>13</sup> The

11. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 723-71 (1975) (only purchasers or sellers of securities have standing to sue in private actions under Rule 10b-5).

12. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 185-218 (1976) (a defendant must have acted with scienter to be liable under Rule 10b-5); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 164-201 (1994) (aiders and abettors are not liable under Rule 10b-5); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 148-80 (2008) (defendants who made false statements to facilitate another company's securities fraud are not liable under Rule 10b-5 where the plaintiffs did not directly rely on those fraudulent statements); *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 247-86 (2010) (Rule 10b-5 applies only to transactions in securities listed on U.S. exchanges or domestic transactions in other securities).

13. Securities Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b).

plaintiff sought to hold Janus Capital Management, an investment adviser, liable for alleged misstatements in prospectuses filed by the Janus Investment Fund, a mutual fund it created and advised. The plaintiff alleged that Janus Capital Management was “significantly involved in preparing the prospectuses”<sup>14</sup> and disseminated the prospectuses through its parent company’s web site.<sup>15</sup>

The Supreme Court, in a 5-4 decision, held that the “maker” of a statement for purposes of Rule 10b-5 is “the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>16</sup> The majority opinion rejected the Court of Appeals’ conclusion that Janus Capital could be liable under Rule 10b-5 because it participated in the drafting and dissemination of the prospectus.<sup>17</sup> According to the majority, “[o]ne who prepares or publishes a statement on behalf of another is not its maker.”<sup>18</sup>

### B. *PROUSALIS v. MOORE*

*Prousalis v. Moore* involved a criminal conviction for a violation of Rule 10b-5.<sup>19</sup> Prousalis was a securities lawyer who prepared registration materials for an initial public offering by Busybox.com, Inc. Prousalis concealed the fraud from Busybox’s officers and even rejected an attempt by Busybox’s CEO to correct the registration statement.<sup>20</sup> Prousalis pled guilty,<sup>21</sup> but, after the *Janus* decision, filed a habeas petition claiming that, as a result of *Janus*, his conduct was no longer criminal.<sup>22</sup>

Prousalis was clearly not the maker of the false statements within the meaning of *Janus*.<sup>23</sup> The registration statement was Busybox’s, and Busybox had the “ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>24</sup> *Janus* makes it clear that those, like the lawyer in *Prousalis*, who merely draft fraudulent statements are not makers. However, the majority opinion in *Prousalis*, written by Judge Wilkinson, held that the *Janus* definition of maker did not apply in criminal cases, and, therefore, Prousalis’s actions could still violate Rule 10b-5.<sup>25</sup>

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14. *Janus*, 131 S. Ct. at 2305.

15. *Id.* at 2312 (Breyer, J., dissenting).

16. *Id.* at 2299, 2302. The majority noted that, “in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it was attributed.” *Id.* at 2302.

17. *Id.* at 2301.

18. *Id.* at 2302.

19. *Prousalis*, 751 F.3d at 275.

20. *Id.* at 274–75.

21. *Id.* at 273.

22. *Id.* at 275.

23. *See id.* at 279 (quoting *Janus*, 131 S. Ct. at 2302).

24. *Janus*, 131 S. Ct. at 2302.

25. Judge Traxler concurred in the result. He conceded that “‘make’ has the same meaning in the criminal context as it does in the context of a private right of action.” *Prousalis*, 751 F.3d at 279 (Traxler, J., concurring in the result). But he believed Prousalis would still be liable under 18 U.S.C. § 2(b), which imposes liability as a principal on any-

The *Prousalis* majority presented three arguments in favor of its position. First, they pointed out that *Janus* was a private right of action and argued that the concerns that led *Janus* to limit the private right of action do not apply in the criminal context.<sup>26</sup> Second, they argued that considerations of judicial restraint and legislative primacy counseled against applying *Janus* to criminal actions.<sup>27</sup> Finally, they pointed out that no other court had applied *Janus* in a criminal case.<sup>28</sup> I discuss each of those arguments in Section III.

### III. THE PROBLEM WITH *PROUSALIS*

#### A. PRIVATE RIGHTS OF ACTION VS. TEXTUAL INTERPRETATION

The *Prousalis* majority relied primarily on the fact that *Janus* was a private right of action; the Supreme Court carefully limited the question presented to liability in private rights of action.<sup>29</sup> Because the implied private right of action under Rule 10b-5 was judicially created, the Supreme Court has construed it narrowly.<sup>30</sup> That concern does not apply to an express criminal action created by Congress.<sup>31</sup> *Prousalis* also notes that the two main precedents the *Janus* majority relies on—*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*<sup>32</sup> and *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*<sup>33</sup>—not only involved private rights of action, but also requirements that would not apply in criminal cases.<sup>34</sup> All of that is correct, but none of it justifies the conclusion that *Prousalis* draws—that the *Janus* definition of “maker” should not apply in criminal cases.

The *Prousalis* argument, if correct, would extend beyond criminal actions. If *Janus* is limited to private rights of action, then *Janus* also would not apply to civil enforcement actions by the SEC.<sup>35</sup> The SEC has an

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one who “willfully causes an act to be done which if directly performed by him or another would be an offense.” *Id.* at 279–80 (quoting 18 U.S.C. § 2(b) (2012)).

26. *Prousalis*, 751 F.3d at 276–78.

27. *Id.* at 278–79.

28. *Id.* at 279.

29. *Id.* at 276; see *Janus*, 131 S. Ct. at 2301–02. Donald Langevoort briefly focuses on this aspect of *Janus* and asks whether the Supreme Court was construing the rule or just the private right of action. He calls this “the biggest mystery about the Court’s opinion.” Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 938 (2013).

30. See *Janus*, 131 S. Ct. at 2302.

31. *Prousalis*, 751 F.3d at 277.

32. 552 U.S. 148 (2008).

33. 511 U.S. 164 (1994).

34. *Prousalis*, 751 F.3d at 276–77.

35. One court has stated without analysis that *Janus* does not apply in an SEC enforcement action. See *SEC v. Pentagon Capital Mgmt. PLC*, 844 F. Supp. 2d 377, 422 (S.D.N.Y. 2012). The overwhelming authority is to the contrary. See *infra* notes 70–72 and accompanying text. And the statement in *Pentagon Capital Management* is dictum because the case involved a scheme liability claim under subsections (a) and (c) of Rule 10b-5, and the court held that *Janus* did not apply at all to those subsections. *Pentagon Capital Mgmt.*, 844 F. Supp. 2d at 422; see also Andrew P. Arnold, *Two Faces of Janus in the District Courts: Is Liability for Securities Fraud under Section 17(a) Limited to Actors with Ultimate Authority over Untrue Statements*, 91 N.C. L. REV. 1054, 1063 (2013) (“[A]lthough the decision in

express right of action to enforce Rule 10b-5 and the Supreme Court's reluctance to expand private rights of action would not extend to SEC actions. Thus, the question is really whether "maker" has a different meaning in government actions under Rule 10b-5, civil or criminal, than it has in private rights of action.

The starting point in answering that question is a distinction the Supreme Court itself has made in interpreting Rule 10b-5. According to the Court, its decisions interpreting Rule 10b-5 have involved two distinct types of issues: (1) those relating to the scope of conduct prohibited by Rule 10b-5; and (2) those relating to the elements of a cause of action to recover against a defendant who has engaged in prohibited conduct.<sup>36</sup> Both *Janus* and *Prousalis* fall into the former category—asking what conduct is prohibited by Rule 10b-5.

If an issue falls into the latter category—relating to the elements of a cause of action—the Supreme Court has indicated that private rights of action raise special concerns,<sup>37</sup> and government actions should be treated differently. In fact, not treating government actions differently would often produce silly results. For example, the Supreme Court held in *Blue Chip Stamps* that a private party may bring an action under Rule 10b-5 only if she purchased or sold a security in connection with the fraud.<sup>38</sup> Since the government will almost never be a purchaser or seller, applying *Blue Chip Stamps* to the government would eliminate almost all criminal and SEC enforcement actions. Similarly, the government is not required to show reliance in actions under Rule 10b-5, even though that requirement is usually imposed on private plaintiffs.<sup>39</sup>

The special treatment of government cases with respect to this category of issues comes from outside of Rule 10b-5. Congress has expressly granted standing to the government to bring criminal and civil enforcement actions alleging fraud directed against others. That externally con-

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*Janus* was premised in part on the need to limit the private right of action, it is apparent from the plain language of the opinion that the ultimate authority requirement also applies to claims brought by the SEC."). *But see* Langevoort, *supra* note 29, at 941 ("I prefer to take the Court's statement of its holding literally: we are being told what 'make' means in the context of private securities litigation under Rule 10b-5, leaving open how it is to be construed in the context of public enforcement."); Matthew P. Wynne, *Rule 10b-5 Enforcement Actions in Light of Janus: Making the Case for Agency Deference*, 81 *FORDHAM L. REV.* 2111, 2114–15 (2013) (arguing that *Janus* should not apply to SEC enforcement actions).

36. "In our cases addressing § 10(b) and Rule 10b-5, we have confronted two main issues. First, we have determined the scope of conduct prohibited by § 10(b). . . . Second, in cases where the defendant has committed a violation of § 10(b), we have decided questions about the elements of the 10b-5 private liability scheme: for example, whether there is a right to contribution, what the statute of limitations is, whether there is a reliance requirement, and whether there is an *in pari delicto* defense." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172 (1994) (internal citations omitted).

37. *Id.* at 173. One of the two important precedents cited in *Janus*—*Stoneridge Investment Partners*—admittedly falls within this category of issues. *Stoneridge* turned on the reliance requirement.

38. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 723 (1975).

39. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 149, 159 (2008).

ferred standing does not depend on the government being a purchaser or relying on the fraud. But the government must still comply with the express requirements in Rule 10b-5 itself. It must, for example, show that the fraud was "in connection with the purchase or sale of any security,"<sup>40</sup> as required by the language of Rule 10b-5, even though it need not itself be a purchaser or seller. The government could not bring an action under Rule 10b-5 for fraud in connection with an appliance sale or a real estate transaction that did not involve a security.

Neither *Janus* nor *Prousalis* fall into this category of cases where government actions get special treatment. They both fall into the other category because they concern the scope of conduct prohibited by Rule 10b-5. In those cases, the Supreme Court has made it clear that the text of the statute and rule govern.<sup>41</sup> Since the text is the same whether the government or a private party brings the action, the scope of prohibited conduct should not vary.

Decisions involving issues in this category have consistently been applied to government actions, even if the requirement was announced by the Supreme Court in a case involving a private right of action. The only exception is if the law outside of Rule 10b-5 expands liability in government actions.

Consider, for example, the scienter requirement. *Ernst & Ernst v. Hochfelder*,<sup>42</sup> the Supreme Court case holding that scienter is required for a defendant to be liable under Rule 10b-5, was a private right of action, and, as in *Janus*, the Court carefully limited the question presented to private rights of action.<sup>43</sup> Yet, the Court strongly rejected the SEC's subsequent argument that it was not required to prove scienter in an injunctive action under Rule 10b-5.<sup>44</sup> The Court held that "the rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of [section] 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought."<sup>45</sup> The Court pointed out that its holding in *Hochfelder* was grounded on the language of section 10(b) and its legislative history, and those were the same no matter who the plaintiff was or what remedy was sought.<sup>46</sup>

*Central Bank*,<sup>47</sup> one of the two precedents *Janus* relies on, also falls into this scope-of-prohibited-conduct category. *Central Bank* held that

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40. Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5.

41. *Cent. Bank*, 511 U.S. at 173.

42. 425 U.S. 185 (1976).

43. "The issue in this case is whether an action for civil damages may lie under [§] 10(b) of the Securities Exchange Act of 1934 . . . and . . . Rule 10b-5 . . . in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant." *Hochfelder*, 425 U.S. at 187-88 (emphasis added).

44. Unlike *Janus*, which said nothing about criminal cases, *Hochfelder* expressly reserved that issue. *Id.* at 193 n.12.

45. *Aaron v. SEC*, 446 U.S. 680, 691 (1980).

46. *Id.* at 694.

47. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175-78 (1994).

aiders and abettors are not liable under Rule 10b-5 because they have not themselves committed an act prohibited by section 10(b).<sup>48</sup> *Central Bank* was a private right of action and the Court carefully limited its discussion to private rights of action.<sup>49</sup> *Prousalis* argues that *Janus*'s invocation of *Central Bank* indicates that *Janus*'s holding "is born out of concerns specific to the implied civil right since . . . aiding and abetting is plainly available under the criminal law."<sup>50</sup>

But aiders and abettors are liable in criminal 10b-5 actions only because, as *Prousalis* acknowledges, a separate statute says so,<sup>51</sup> not because Rule 10b-5 is interpreted differently in criminal cases. If there were a separate statute that broadened the definition of "maker" in criminal cases under Rule 10b-5, the analogy to *Central Bank* would be apposite, but that's not the case.

When a separate statute does not provide for a different rule, *Central Bank* actually supports treating government actions the same as private actions in interpreting scope-of-conduct questions. The dissent in *Central Bank* pointed out that the majority's analysis, with its focus on the text of the statute, "leaves little doubt that the Exchange Act does not even permit the SEC to pursue aiders and abettors in civil enforcement actions."<sup>52</sup> After *Central Bank*, people on both sides of the policy issue indicated that *Central Bank* foreclosed aiding and abetting claims in SEC enforcement actions, not just private actions.<sup>53</sup> At least one court dismissed an SEC aiding-and-abetting claim on the basis of *Central Bank*<sup>54</sup> and others

48. *Id.*

49. The Court indicated that the question was "whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation." *Id.* at 167. At the conclusion of its opinion, the Court wrote, "we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." *Id.* at 191.

50. *Prousalis*, 751 F.3d at 277.

51. *See* 18 U.S.C. § 2 (2012).

52. *Cent. Bank*, 511 U.S. at 200 (Stevens, J., dissenting).

53. *See Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. and Urban Affairs*, 103d Cong., 2d Sess. (S. Hrg. 103-759, May 12, 1994), at 71 (statement of Harvey Goldschmid) ("I see no principled basis for" allowing the SEC to bring aiding and abetting claims.); *id.* at 128 (letter from Harvey Pitt to Sen. Dodd) ("I do not believe it is open to question that the *Central Bank* decision will preclude the SEC from imposing Rule 10b-5 aiding and abetting liability."); *id.* at 152 (letter from Joel Seligman to Sen. Riegle) ("[T]here appears to be no principled basis to avoid Federal courts also holding that the SEC may not bring §10(b) and Rule 10b-5 claims for aiding and abetting."). *But see id.* at 54 (statement of Donald Langevoort) ("If we take the Court literally, then the SEC has lost its ability to charge aiders and abettors with violations of Rule 10b-5," but this result "is not inevitable."); 5 ALAN R. BROMBERG, LEWIS D. LOWENFELS & MICHAEL J. SULLIVAN, *BROMBERG & LOWENFELS ON SECURITIES FRAUD* § 7:305 (2d ed. 2014) (The logic of the majority opinion in *Central Bank* "seemed to apply to SEC civil enforcement," but "it [is] possible that one or two of the majoritarians might have reasoned differently in an SEC suit.").

54. *SEC v. U.S. Envtl., Inc.*, 929 F. Supp. 168 (S.D.N.Y. 1996), *vacated*, 155 F.3d 107 (2d Cir. 1998). The Second Circuit vacated the judgment because it found that the defendant was a primary violator. *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998).

expressed doubts about such claims in dictum.<sup>55</sup> The SEC essentially surrendered, voluntarily dismissing its aiding and abetting claims under Rule 10b-5,<sup>56</sup> but Congress quickly rode to the rescue, adding a provision to the Exchange Act that allows the SEC to pursue aiders and abettors.<sup>57</sup> Far from supporting the *Prousalis* argument, this history shows that Supreme Court holdings as to the scope of defendants' liability in private rights of action also apply to government actions unless there is express statutory authority to the contrary.

The heart of the majority's analysis in *Janus* is textual, interpreting the word "make," with citations to two dictionaries to bolster that interpretation.<sup>58</sup> Only after the majority concludes that the word "make" requires ultimate authority over the statement does it discuss *Central Bank* and *Stoneridge* and note that "[o]ur holding also accords with the narrow scope that we must give the implied private right of action."<sup>59</sup> And Justice Breyer's dissent in *Janus*, pointing out the consequences of the new rule, simply assumes that the holding would apply to SEC enforcement actions.<sup>60</sup>

The *Prousalis* argument that the single word "make" in Rule 10b-5 has two different meanings depending on who brings the action is inconsistent with this textual analysis. The Supreme Court has said that identical words in different parts of the same securities statute are to be interpreted the same.<sup>61</sup> *Prousalis* doesn't even involve different parts of the same statute or regulation; it is reading one word *in one place* to have two different meanings. This contradicts not only *Janus* but the entire line of Supreme Court scope-of-conduct cases.

55. See *SEC v. Fehn*, 97 F.3d 1276, 1283 (9th Cir. 1996) (referring to "*Central Bank's* apparent elimination of the SEC's power to enjoin the aiding and abetting of securities law violations"); *SEC v. Bilzerian*, 29 F.3d 689, 694 n.10 (D.C. Cir. 1994) (stating in an SEC enforcement action, "[t]he evidence also supports a finding that Bilzerian aided and abetted Jefferies' margin and record keeping violations, although there is now reason to doubt that he could be held civilly liable for such aiding and abetting").

56. See, e.g., *SEC v. Patel*, 1994 WL 364089, at \*2 n.1 (S.D.N.Y. July 13, 1994), *aff'd in part and rev'd in part*, 61 F.3d 137 (2d Cir. 1995); *SEC v. Militano*, 1994 WL 285472, at \*9 (S.D.N.Y. June 23, 1994); see also *Abandonment of the Private Right of Action*, *supra* note 53, at 48 (statement of SEC Chairman Arthur Levitt) ("Because alternative enforcement options exist, the Commission does not believe that it would be prudent to devote substantial resources to litigate the issue of whether the *Central Bank of Denver* decision applies to Commission enforcement actions.").

57. Securities Exchange Act of 1934 § 20(e), 15 U.S.C. § 78t(e) (2012); see also Lewis D. Lowenfels & Alan R. Bromberg, *A New Standard for Aiders and Abettors under the Private Securities Litigation Reform Act of 1995*, 52 BUS. LAW. 1 (1996) (discussing the statutory change to allow SEC actions against aiders and abettors).

58. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). "Although it may be clear that *Janus* was motivated by a concern for private actions, the simplicity of distinguishing the *Janus* decision on the basis of the plaintiff's identity belies an obvious impediment: the Court based its entire decision on the word 'make.'" John Patrick Clayton, *The Two Faces of Janus: The Jurisprudential Past and New Beginning of Rule 10b-5*, 47 U. MICH. J. L. REFORM 853, 872 (2014).

59. *Janus*, 131 S. Ct. at 2303 (emphasis added).

60. *Id.* at 2310 (Breyer, J., dissenting).

61. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

## B. OTHER ARGUMENTS

The private action/government action distinction was not the *Prousalis* majority's only argument for rejecting *Janus*. *Prousalis* made two other arguments, but neither of those arguments provides serious support for the result. The other two arguments are specious, or to a less charitable reader, even disingenuous.

## 1. Considerations of Judicial Restraint and Legislative Primacy

The *Prousalis* majority argued that "considerations of judicial restraint and legislative primacy" also supported its holding.<sup>62</sup> According to the majority, "[e]xplicit congressional prohibitions simply operate in a different universe than the one inhabited by *Janus*."<sup>63</sup> A criminal action under Rule 10b-5 "[l]ies] squarely within the legislature's traditional prerogative to prescribe crimes and ranges of punishment."<sup>64</sup> Congress, not the courts, has the power to control federal jurisdiction and "the elements of federal criminal offenses."<sup>65</sup>

The weakness of this argument is apparent once one considers exactly what Congress has and has not done with respect to criminal liability under Rule 10b-5. Nothing in any statute enacted by Congress expressly contradicts the Supreme Court's interpretation in *Janus*. Nor, as far as I know, does anything in the legislative history.<sup>66</sup>

Congress's sole statement on criminal liability under Rule 10b-5 is in section 32(a) of the Exchange Act, which imposes criminal penalties on "any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter."<sup>67</sup> Except for the willfulness requirement, section 32(a) says nothing about who's liable and under what circumstances. Section 10(b) of the Exchange Act, the only other congressional prohibition the *Prousalis* majority might be deferring to, does not by itself make any conduct unlawful. Section 10(b) merely makes it unlawful "to use or employ . . . any manipulative or deceptive device or contrivance *in contravention of such rules and regulations as the Commission may prescribe*."<sup>68</sup> In short, there is no "explicit congressional prohibition" to defer to; the language of the prohibition, whether in a civil or a criminal case, lies squarely within an SEC rule. Congress has said nothing about the extent of criminal liability under Rule 10b-5, so applying *Janus* in criminal cases would in no way disturb any legislative prerogatives.

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62. *Prousalis*, 751 F.3d at 278.

63. *Id.*

64. *Id.*

65. *Id.*

66. Neither *Janus* nor *Prousalis* cite any legislative history to the contrary.

67. Securities Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (2012).

68. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (emphasis added).

## 2. No Other Cases Apply *Janus* in the Criminal Context

The weakness of the *Prousalis* opinion is best illustrated by its concluding point. The majority noted that not a single appellate or district court had applied *Janus* in the criminal context, concluding, "[t]here is a good reason for this dearth of cases. It is not the role of courts to blaze new trails into uncharted territory in the absence of any clear textual or precedential mandate for doing so."<sup>69</sup>

What the *Prousalis* majority neglected to mention was that, except for *Prousalis*, not a single appellate or district court case had *refused* to apply *Janus* in the criminal context. There were no criminal cases applying *Janus* because *Prousalis* was the first published case raising the issue.

There are, however, several cases discussing the application of *Janus* in SEC enforcement proceedings. The *Prousalis* majority ignored these cases, which do not support its position. A number of lower courts have applied *Janus* to SEC enforcement actions under Rule 10b-5,<sup>70</sup> and others have assumed *arguendo* that *Janus* applies to such actions.<sup>71</sup> In fact, the SEC has conceded in several enforcement cases under Rule 10b-5(b) that *Janus* applies to it.<sup>72</sup> Only one court has said that *Janus* does not apply to SEC enforcement cases and that case didn't involve subsection (b) of Rule 10b-5, so its statement is dictum at best.<sup>73</sup>

Since the distinction made in *Prousalis* between private actions and public enforcement applies with equal force to SEC enforcement actions, the majority's failure to note these cases is bewildering. If Rule 10b-5 applied to judicial decisions, this omission would probably violate the rule.<sup>74</sup> But, to be charitable to the opinion's author, perhaps "make" means something different when applied to judicial opinions.

## IV. CONCLUSION

The majority in *Janus* meant exactly what it said: the person who "makes" a fraudulent statement for purposes of Rule 10b-5 is "the person or entity with ultimate authority over the statement."<sup>75</sup> That holding, like other Supreme Court decisions restricting the scope of Rule 10b-5, may

69. *Prousalis*, 751 F.3d at 279.

70. See SEC v. Levin, 2013 WL 5588224, at \*14 (S.D. Fla. Oct. 10, 2013); SEC v. Brown, 878 F. Supp. 2d 109, 115–16 (D.D.C. 2012); SEC v. Perry, 2012 WL 1959566, at \*8 (C.D. Cal. May 31, 2012); SEC v. Sentinel Mgmt. Group, Inc., 2012 WL 1079961, at \*5 (N.D. Ill. Mar. 30, 2012); SEC v. Kelly, 817 F. Supp. 2d 340, 343–44 (S.D.N.Y. 2011); SEC v. Carter, 2011 WL 5980966, at \*2–3 (N.D. Ill. Nov. 28, 2011).

71. See SEC v. Garber, 959 F. Supp. 2d 372, 381 (S.D.N.Y. 2013); SEC v. Landberg, 836 F. Supp. 2d 148, 154 (S.D.N.Y. 2011).

72. See SEC v. Bengler, 931 F. Supp. 2d 908, 912 (N.D. Ill. 2013), and cases cited therein.

73. See *supra* note 35 and accompanying text.

74. Under Rule 10b-5, a statement is actionable if it "omit[s] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Securities Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b).

75. *Janus*, 131 S. Ct. at 2299, 2302.

or may not be good policy. But, unless Congress revises the statute, the SEC revises the rule, or the Supreme Court reverses itself, *Janus* is the law. Unless a person “makes” a statement within the meaning of *Janus*, that person’s conduct does not violate Rule 10b-5(b), no matter who is asserting the violation.

*Prousalis*’s argument to the contrary is wrong. The word “make” in Rule 10b-5 does not magically transform into something entirely different if the person bringing the claim happens to be affiliated with the United States government. “Make” means “make,” no matter who’s asking.