Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CREDIT SUISSE SECURITIES (USA) LLC, FKA CREDIT SUISSE FIRST BOSTON LLC, ET AL. *v.* BILLING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–1157. Argued March 27, 2007—Decided June 18, 2007

Respondent investors filed suit, alleging that petitioner investment banks, acting as underwriters, violated antitrust laws when they formed syndicates to help execute initial public offerings (IPOs) for several hundred technology-related companies. Respondents claim that the underwriters unlawfully agreed that they would not sell newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (known as "laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (known as "tying"). The underwriters moved to dismiss, claiming that federal securities law impliedly precludes application of antitrust laws to the conduct in question. The District Court dismissed the complaints, but the Second Circuit reversed.

Held: The securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case. Pp. 4–20.

(a) Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude the antitrust laws' application. Taken together, *Silver* v. *New York Stock Exchange*, 373 U. S. 341; *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659; and *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 *(NASD)* make clear that a court deciding this preclusion issue is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint, *i.e.,* whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication of preclusion,

treated as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In addition, (4) in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate. Pp. 4–10.

(b) Several considerations—the underwriters' efforts jointly to promote and sell newly issued securities is central to the proper functioning of well-regulated capital markets; the law grants the SEC authority to supervise such activities; and the SEC has continuously exercised its legal authority to regulate this type of conduct—show that the first, second, and fourth conditions are satisfied in this case. This leaves the third condition: whether there is a conflict rising to the level of incompatibility. Pp. 10–12.

(c) The complaints here can be read as attacking the *manner* in which the underwriters jointly seek to collect "excessive" commissions through the practices of laddering, tying, and collecting excessive commissions, which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. Nonetheless, certain considerations, taken together, lead to the conclusion that securities law and antitrust law are clearly incompatible in this context. Pp. 12–19.

(1) First, to permit antitrust actions such as this threatens serious securities-related harm. For one thing, a fine, complex, detailed line separates activity that the SEC permits or encourages from activity that it forbids. And the SEC has the expertise to distinguish what is forbidden from what is allowed. For another thing, reasonable but contradictory inferences may be drawn from overlapping evidence that shows both unlawful antitrust activity and lawful securities marketing activity. Further, there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results. Together these factors mean there is no practical way to confine antitrust suits so that they challenge only the kind of activity the investors seek to target, which is presently unlawful and will likely remain unlawful under the securities law. Rather, these considerations suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And that threat means that underwriters must act to avoid not simply conduct that the securities law forbids, but also joint conduct that the securities law permits or encourages. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of

Syllabus

the securities market. Pp. 14–17.

(2) Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, investors harmed by underwriters' unlawful practices may sue and obtain damages under the securities law. Finally, the fact that the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations makes it somewhat less necessary to rely on antitrust actions to address anticompetitive behavior. Pp. 17–18.

(3) In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between application of the antitrust laws and proper enforcement of the securities law. The Solicitor General's proposal to avoid this conflict does not convincingly address these concerns. Pp. 18–19.

426 F. 3d 130, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion. KENNEDY, J., took no part in the consideration or decision of the case.