No. ________

In The
Supreme Court of the United States

DELOITTE & TOUCHE LLP and JAN A. LOMMELE,

Petitioners,

v.

THE RGH LIQUIDATING TRUST, on behalf of RELIANCE GROUP HOLDINGS, INC., THE GENERAL UNSECURED CREDITORS OF RELIANCE GROUP HOLDINGS, INC., RELIANCE FINANCIAL SERVICES CORP. (n/k/a Reorganized RFS Corporation), and THE GENERAL UNSECURED CREDITORS OF RELIANCE FINANCIAL SERVICES CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOL. I, PAGES 1 TO 359

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QUESTION PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb(f), was enacted to ensure that certain "covered class actions" involving allegations of fraud in connection with the purchase or sale of nationally traded securities would be subject to uniform federal standards. Toward that end, SLUSA generally provides that "[n]o" such "covered class action" that is "based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party." *Id.* § 78bb(f)(1). This prohibition hinges on the defined term, "covered class action," which includes "any single lawsuit in which . . . damages are sought *on behalf of more than 50 persons or prospective class members*." *Id.* § 78bb(f)(5)(B)(i)(I)(emphasis added). In a provision entitled "Counting of Certain Class Members," the statute clarifies how "persons or prospective class members" that are *entities* on whose behalf "damages are sought" shall be counted: "a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action." *Id.* § 78bb(f)(5)(D).

In the decision below, a divided New York Court of Appeals, reversing a unanimous five-judge panel of the Appellate Division, held that even though this lawsuit indisputably (and by the express terms of the complaint) seeks damages "on behalf of" more than 50 bondholders based on state-law securities fraud claims, it is not a "covered class action" that is precluded by SLUSA. Although acknowledging that the question was "difficult," the majority reached this result because the bondholders had assigned their claims to — and the lawsuit had been initiated by — an entity (a trust) that was created in part (but, in the view of the lower court, not "primarily") to assert those claims on behalf of the bondholders. The question presented is:

Whether the New York Court of Appeals, in agreement with the Ninth Circuit but in conflict with the Third Circuit, correctly derived from SLUSA's "Counting of Certain Class Members" provision a "single-entity exemption" under which a state-law securities fraud action that indisputably was brought on behalf of more than 50 bondholders and would otherwise be precluded by SLUSA is permissible so long as the named plaintiff entity itself was not established for the "primary" purpose of bringing the lawsuit?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Deloitte & Touche LLP states that it is a Delaware limited liability partnership that does not issue stock and has no parent corporation.

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The decision of the New York County Supreme Court denying the motion to dismiss the amended complaint as barred by SLUSA (App.68-91) is reported at 17 Misc.3d 1128(A) and 851 N.Y.S.2d 73. The Appellate Division's unanimous decision that SLUSA precludes the bondholders' claims (App.37-67) is reported at 71 A.D.3d 198 and 891 N.Y.S.2d 324. The New York Court of Appeals' divided decision reversing the Appellate Division (App.1-34) is reported at 2011 WL 2471542.

JURISDICTION

The judgment of the New York Court of Appeals was entered on June 23, 2011. On July 19, 2011, petitioners moved for reargument solely with respect to the scope of remand instructions, and not on the SLUSA issue. On August 31, 2011, Justice Ginsburg extended the time to file this petition to October 21, 2011. On September 20, 2011, the court below denied reargument. App.92-94. This Court has jurisdiction under 28 U.S.C. § 1257 to review the judgment below as to SLUSA because that federal issue has been finally decided in the state courts, and reversal on the SLUSA question would be preclusive of any further litigation on the bondholders' claims. *See, e.g., Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 485-86 (1975) (Georgia Supreme Court's final judgment on a federal issue was ripe for review even though plaintiff could prevail at trial on nonfederal grounds).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of SLUSA are reproduced at App.95-106.

STATEMENT

The New York Court of Appeals has decided an important and recurring issue of federal law in a way that deepens a conflict between the Ninth and Third Circuits and is at odds with this Court's decision in *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). By divided vote, the lower court held that SLUSA does not bar a lawsuit in which a trust as assignee sought, on behalf of more than 800 bondholders, to assert New York state-law claims alleging fraud in connection with the bondholders' purchases or holding of covered securities. There is no question that if the bondholders themselves had brought their claims in a single action the claims would be barred by SLUSA, because there are far more than 50 bondholders. But the court below, adopting the flawed analysis of the Ninth Circuit in *Smith v. Arthur Andersen LLP,* 421 F.3d 989, 1006-08 (9th Cir. 2005), ruled that the same claims are *not* barred when brought by respondent, a trust. The majority reasoned that a named *plaintiff* entity suing on behalf of more than 50 persons qualifies for a "single-entity exemption" from SLUSA preclusion if the entity was not established for the "primary" purpose of bringing the lawsuit. Further review is warranted because this holding (1) exacerbates the Ninth Circuit's conflict with the Third Circuit, which held in *LaSala v. Bordier et Cie*, 519 F.3d 121, 132-35 (3d Cir. 2008), that a lawsuit is barred by SLUSA if the original owners of the claim — those injured by the complained of conduct — number more than fifty, as they do in this case; (2) defies this Court's unanimous instructions that SLUSA should be construed broadly and that the existence of enumerated statutory "carve-outs" makes "it inappropriate for courts to create additional, implied exceptions" (*see Dabit*, 547 U.S. at 86-88); (3) is contrary to the plain language of the statute; and (4) undermines SLUSA's loophole-closing purpose by allowing the statute's commands to be easily circumvented.

A. The Origins and Scope of SLUSA's Preclusion of "Covered Class Actions"

Congress enacted SLUSA in 1998 to close a loophole in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which itself had been enacted to address "ways in which the class-action device was being used to injure the entire U.S. economy." *Dabit*, 547 U.S. at 81. The PSLRA imposed heightened pleading requirements on plaintiffs bringing federal securities lawsuits, limited damages and attorneys' fees recoverable in such suits, imposed restrictions on discovery and on the selection and compensation of lead plaintiffs in such actions, and provided a "safe harbor" for certain forward-looking statements. *Id.* at 81-82. But the PSLRA had "an unintended consequence:" many securities plaintiffs decided "to avoid the federal forum altogether" and brought "class actions under state law, often in state court." *Id.* at 82. Congress enacted SLUSA to close this loophole and ensure that there would be "national standards for securities class action lawsuits involving nationally traded securities." *Id.* at 86-87 (quoting SLUSA § 2(5), 112 Stat. 3227 (1998)).

SLUSA generally mandates that class actions and actions on behalf of more than 50 persons involving nationally traded securities shall proceed *only* under federal securities laws. Thus, "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). SLUSA defines the critical term, "covered class action," to include:

> (i) *any* single lawsuit in which –
>
> (I) damages are sought *on behalf of more than 50 persons or prospective class members*, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members;

15 U.S.C. § 78bb(f)(5)(B)(i)(I) (emphasis added). To determine whether there are in fact more than 50 "persons or prospective class members" on whose behalf "damages are [being] sought" in a single lawsuit, SLUSA includes a provision (aptly titled "Counting of certain class members") that states:

> For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

15 U.S.C. § 78bb(f)(5)(D). Congress included five "tailored exceptions" to SLUSA's preclusion of "covered class actions," "carefully exempt[ing] from its operation certain class actions based on the law of the State in which the issuer of the covered security is incorporated, actions brought by a state agency or pension plan, actions under contracts between issuers and indenture trustees, and derivative actions brought by shareholders on behalf of a corporation," as well as "state jurisdiction over state agency enforcement proceedings." *Dabit,* 547 U.S. at 87; *see* 15 U.S.C. §§ 78bb(f)(3)(A)-(C), (f)(4) and (f)(5)(C). As this Court has explained, "[t]he existence of these carve-outs" — none of which applies in this case — "makes it inappropriate for courts to create additional, implied exceptions." 547 U.S. at 87-88.

B. The Factual Background To This Litigation

This case arises out of the insolvency of Reliance Group Holdings, Inc. ("RGH"), a publicly held company which owned Reliance Financial Services Corporation ("RFS"), which in turn owned Reliance Insurance Company ("RIC") (collectively, "Reliance"). Petitioner Deloitte & Touche LLP was Reliance's outside auditor. Petitioner Jan Lommele was RIC's appointed actuary. App.2.

By the end of 1999, Reliance was "on the brink of insolvency." App.116. In February 2000, RGH suspended its dividend and extended the maturity of its bank loans. Shortly thereafter, RGH reported a $36.5 million operating loss for the first quarter of 2000 and RIC stopped underwriting property and casualty insurance. App.2.

In June 2000, stockholders filed a federal securities fraud class action (the first of several) in federal court in New York against RGH and three former officers. The stockholders alleged that the defendants had made false and misleading statements concerning RGH's financial condition, and thereby artificially inflated its stock price. Subsequently, bondholders who had purchased either 9% senior notes due November 15, 2000 or 9.75% senior subordinated debentures due November 15, 2003, launched similar securities class actions against RGH and officers in the same court. The cases were consolidated in October 2000. But the bondholders chose not to sue petitioners. App.3.

By December 5, 2000, the price of RGH's shares had dropped to 39 cents. The next day, the New York Stock Exchange suspended trading of RGH's securities. On May 29, 2001, the Pennsylvania Commonwealth Court placed RIC in rehabilitation. On June 12, 2001, RGH and RFS filed voluntary petitions in the United States Bankruptcy Court in New York, seeking Chapter 11 bankruptcy protection. App.3-4.

On November 7, 2005, the Bankruptcy Court confirmed RGH's First Amended Plan of Reorganization. App.211. The Plan authorized the creation of respondent RGH Liquidating Trust ("the Trust") to receive an assignment of causes of action held by RGH, RFS and some of their unsecured creditors. App.5. 454 senior bondholders and 364 subordinated bondholders voted in favor of the Plan, App.50, and assigned their claims to respondent. App.132.

C. The Proceedings Below

1. *The Initiation of This Litigation and The Trial Court's Ruling.* On January 6, 2006, respondent filed a complaint commencing this lawsuit in New York Supreme Court. App.6. Respondent alleged that RGH's bondholders were fraudulently induced to hold or purchase the bonds by (1) Deloitte's audit report concerning Reliance's December 31, 1999 consolidated financial statements, which were publicly filed with the SEC on March 30, 2000, and (2) Mr. Lommele's February 25, 2000 statement of actuarial opinion concerning RIC's loss reserves for 1999. App.132-55. By the time this *state* law complaint was filed, the bondholders' time to bring *federal* securities fraud claims had long since passed (App.45),[1] and federal securities law indisputably would have barred their "holder" claims. *See Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 754-55 (1975).

After the trial court dismissed the original complaint, respondent, in its capacity as assignee, served an amended complaint repleading the New

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[1] The bondholders had more than ample opportunity to bring the federal securities claims against petitioners in 2000, when the bondholders sued RGH and its officers, but elected not to do so.

York common law fraud claims of the bondholders, "the largest group of creditors whose claims have been assigned to the RGH Liquidating Trust," and other creditors. App.132. From the caption, to the introductory paragraphs and titles of the causes of action, through the ad damnum paragraphs at the end, the amended complaint repeatedly emphasizes that it seeks to recover damages on behalf of the bondholders, and that the bondholders are the claimholders and injured parties. Thus, respondent seeks damages "on behalf of" (App.107-08) and a "judgment in favor of" (App.207), and is "administer[ing]" the claims of (App.132), the bondholders; respondent was "established to pursue creditors' claims" (App.120) and the causes of action are "by the creditors" (App.198, 202); it is the bondholders who "suffered [the] damages" that are sought (App.202, 207); and respondent will "distribute[] to the bondholders on a pro rata basis" "[a]ny money recovered by the Trust on the bondholders' claims." App.155.

In December 2006, petitioners moved to dismiss the amended complaint. Petitioners contended, among other things, that the bondholders' claims were barred by SLUSA because respondent was asserting claims on behalf of more than 50 bondholders (and, as respondent has never disputed, the other preconditions for SLUSA preclusion were all satisfied).[2]

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[2] Respondent has never disputed that (i) the bonds are "covered securities" under SLUSA because they were listed on the New York Stock Exchange, App.106; 15 U.S.C. § 78bb(f)(5)(E), (ii) respondent's claims are based on state law and allege

On November 7, 2007, the trial court ruled that SLUSA did not bar the bondholders' claims. App.68-91. The court did not analyze the text, structure, or purposes of SLUSA. Instead, the court found that the Ninth Circuit's decision in *Smith* established the blanket rule that a "trustee qualifies as a single entity" and that SLUSA does not preclude the trustee's action "where the trustee's appointment is not for the 'primary purpose' of pursuing causes of action," App.70 — even where, as here, the trustee is asserting claims on behalf of more than 50 bondholders.[3]

2. *The Appellate Division's Decision.* A five-judge panel of the Appellate Division unanimously rejected the trial court's reasoning and dismissed the bondholders' claims as barred by SLUSA. App.37-67. The court explained that, "[s]ince it is undisputed that all the other elements required to render SLUSA applicable are satisfied," respondent's "ability to pursue the bondholders' claims in this single lawsuit turns on whether those claims seek 'damages . . . on behalf of more than 50 persons.'"

[Footnote continued from previous page]
misrepresentations "in connection with the purchase or sale of a covered security," and (iii) common questions of law or fact concerning the financial condition of RGH and petitioners' alleged conduct predominate over issues affecting individual bondholders exclusive of reliance.

[3] The court also found that respondent stated claims for three other categories of creditors (App.76-82, 85-87), and the Appellate Division affirmed. App.64-66. These other creditors' claims were not addressed by the Court below and are not at issue here.

App.47 (*quoting* 15 U.S.C. § 78bb(f)(5)(B)(i)(I)). Turning to that dispositive question, the court observed that "there is no question that the RGH Trust is asserting the claims of more than 50 bondholders in this action." App.52. Relying on the Third Circuit's decision in *LaSala,* the court reasoned that the phrase "on behalf of more than 50 persons" in 15 U.S.C. § 78bb(f)(5)(B)(i) "refers to the assignors of a claim, not to the assignee," and the "counting" provision did not exempt respondent's bondholder claims from SLUSA. App.58 & n.12. It was of no moment that respondent itself could conceivably be characterized as a single entity. "What . . . matter[ed] under SLUSA" was that, single entity or not, respondent was suing on behalf of more than 50 bondholders who were "the allegedly injured parties for whom damages are sought." App.54.

The Appellate Division found additional support for this conclusion in the congressional purposes underlying SLUSA. The statute, the court explained, embodies the strong federal policy "to prevent a group of more than 50 claimants, or a litigant seeking to represent a class having more than 50 prospective members, from evading the limits placed on actions under the federal securities laws by casting securities-related fraud claims as state-law claims in a single lawsuit." App.44-45 & n.2, 47 n.3. Yet that "is precisely what the RGH Trust and the bondholders are doing in this action," because the bondholders' securities claims were "time-barred under federal law" and federal securities law barred the bondholders' "holder" claims. *Id.* SLUSA simply does not permit "[a] group (like the Reliance bondholders) of more than 50 holders of securities issued by a bankrupt entity . . . to defeat SLUSA through the expedient of voluntarily assigning their claims for alleged securities fraud to the bankruptcy trustee of the issuer's estate." App.63. The court reasoned that respondent's role was functionally indistinguishable from that of any shareholder representative, and "[t]o paraphrase a well-worn expression, a class representative by any other name would offend SLUSA as much." *Id*.

Finally, the Appellate Division rejected respondent's argument, based on *Smith*, that SLUSA preclusion should turn, not on whether the claim was brought on behalf of more than 50 persons, but on whether the named plaintiff was created for the "primary" purpose of filing the action. App.52. The court explained that this contention is doubly flawed. First, it overlooks Section 78bb(f)(5)(B)(i)'s focus on the number of persons "on behalf of" whom "damages" are sought in one lawsuit. Beyond that, it ignores the wording of the counting provision, which "excludes from single-person treatment any entity 'established for the purpose of participating in the action,' not only entities whose *sole* or *primary* purpose is to participate in the action." App.55 (emphasis added). Since "[t]he word 'purpose' is not modified in any way," respondent would not be exempted from SLUSA because "[t]he record in this case makes plain" that respondent *was* established "for the purpose of participating in this action," whether or not that was respondent's primary purpose. App.55-56.

3. *The New York Court of Appeals' Decision.* a. In a divided decision, the court below reversed the Appellate Division. App.1-34. The court acknowledged that the question whether SLUSA precluded the bondholders' claims was "difficult," likely to recur given the growing "popularity" of liquidating trusts for pursuing securities law claims on behalf of more than 50 creditors,[4] and "one which will ultimately be decided by the federal courts." App.12, 15, 16 n.8. Adopting the Ninth Circuit's analysis, the majority ruled that, because the Trust itself was not established for the "primary" purpose of bringing the lawsuit, it was entitled to a "single-entity exemption" from SLUSA preclusion — even though it was asserting the claims of more than 800 bondholders.

The majority explained that the Ninth Circuit found it "sensible" to provide a "single-entity exemption" from SLUSA for actions brought by plaintiff entities whose "primary" purpose was not to pursue causes of action. App.19. In addition, "the

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[4] A liquidating trust is a creature of contract usually established by creditors pursuant to the provisions of a confirmed bankruptcy plan, with duties and responsibilities set forth in a trust agreement. As the dissent below explained, it is "no different than any shareholder class representative" and brings "claims assigned to it for the purpose of suit." App.33. *See also Semi-Tech Litig., LLC v. Bankers Trust Co.*, 272 F. Supp. 2d 319, 324 (S.D.N.Y. 2003) (litigation trust is "no different" than any other assignee "outside the bankruptcy context"). In contrast, a "trustee in bankruptcy" is a creature of statute that is appointed by the Bankruptcy Court with duties and responsibilities set forth in the Bankruptcy Code, which does not include standing to pursue creditors' claims. *See* 11 U.S.C. § 1104 *et. seq.*, and footnote 12 below.

majority of the federal courts to have considered whether a liquidating trust may press state law fraud claims against a bankrupt corporation's outside counselors and consultants for the benefit of the corporation's creditors" have agreed with the Ninth Circuit's single-entity exemption and "zeroed in on whether the trust's 'primary purpose' is litigation of such claims." App.23-24. The majority did not identify any language in SLUSA that actually supports the single-entity exemption.

The majority acknowledged that the Third Circuit in *LaSala* declined to recognize such a single-entity exemption, and instead determined the scope of SLUSA preclusion by reference to the number of "injured parties" who originally owned the asserted claims. App.21-23. But the majority chose not to follow that approach, which would have required affirmance of the Appellate Division's unanimous holding that the bondholders' claims are precluded by SLUSA.

Finally, the majority purported to find support for its approach in the legislative history of SLUSA (without, however, identifying any ambiguity in the text that warranted resort to the legislative history). App.13-14; compare App.61 (Appellate Division concluded that legislative history provides no support for a single-entity exemption), App.30 (same for dissenting opinion in Court of Appeals).

b. Judge Smith dissented. App.26-34. He explained that as a matter of "common sense," respondent's bondholder claims are "of course" a "covered class action" under SLUSA: respondent "is the assignee of more than 50 bondholders, and any damages it recovers will be distributed to those bondholders." App.28. The "counting" provision is simply "not relevant to this case, because even if the Trust is 'treated as one person' it is still suing 'on behalf of' more than 50 others — just as a class representative may be one person, but a class action will still be barred by SLUSA." App.28-29. "[T]o ignore the obvious fact that [respondent] is acting on behalf of more than 50 other persons, simply invites evasion of SLUSA. That, as I view it, is all there is to this case." App.30.

Judge Smith also observed that the majority's ruling was in conflict with the Third Circuit's decision in *LaSala*. "It is apparent that the *LaSala* court would have held the present case to be barred by SLUSA" because "'the assignors' were not a bankrupt corporation, but more than 50 bondholders. It is they, in *LaSala's* terms, who are the 'injured parties,' and this action is brought on their 'behalf.'" App.31-32.

REASONS FOR GRANTING THE PETITION

This case raises an important and recurring issue of federal law that has a significant impact on the capital markets, on federal bankruptcy proceedings in which liquidating trusts are being used with increasing frequency to assert securities claims on behalf of more than 50 creditors, and on the division of jurisdictional authority between state and federal courts. In the decision below, the New York Court of Appeals, the highest court of a jurisdiction vitally important to the securities markets, reversed a unanimous five-judge Appellate Division, and in so doing, exacerbated a conflict between the Ninth and

Third Circuits over the scope of SLUSA's preclusion of "covered class actions." At least four different rules have emerged concerning the relationship of SLUSA's definition of "covered class actions" to its "counting" provision — and three of the rules were endorsed by one or more of the 13 New York judges who addressed the issue in this case. This case is an ideal vehicle for resolving this issue, not only because it was thoroughly analyzed by three levels of the New York courts (with conflicting results), but also because the limits imposed by Congress on appellate review of decisions of the federal district courts in cases removed under SLUSA ensure that few cases will reach this Court through the federal court system. *See* 28 U.S.C. § 1447(d). The Court should take this valuable opportunity to address this issue and correct an interpretation of SLUSA that strays from the plain language and structure of the statute, ignores this Court's teaching in *Dabit,* and, if permitted to stand, will allow SLUSA's loophole-closing proscriptions to be easily circumvented.

I. THE NEW YORK COURT'S DECISION DEEPENS AN EXISTING CONFLICT BETWEEN THE NINTH AND THIRD CIRCUITS AND IS AT ODDS WITH THIS COURT'S DIRECTIONS

The New York Court of Appeals' decision to base SLUSA preclusion on the provenance of the named plaintiff entity and not, as required by SLUSA, on whether the action is a class action or brought "on behalf of more than 50 persons," deepens an existing conflict between the Ninth and Third Circuits on this very issue. In *Smith*, a trustee for the Boston Chicken Estate brought state-law claims alleging that company officers or directors and outside professionals had misrepresented its financial condition. Defendants asserted that the claims were barred by SLUSA because the trust had more than 50 beneficiaries. The court, however, held that because the trust had not been established for the "primary" purpose of litigation, it was entitled to a single-entity exemption, derived from SLUSA's "Counting of certain class members" provision, and the action therefore was not precluded.

The Third Circuit applied a very different approach in *LaSala*. There, trustees of the AremisSoft Corporation Liquidating Trust brought an action against two banks for aiding and abetting a breach of fiduciary duty by the Corporation's principals. 519 F.3d at 131-32. The district court, following the Ninth Circuit's reasoning, applied the "counting" provision to determine whether the *plaintiff* was entitled to be treated as a single person, thereby exempting the action from SLUSA preclusion. *LaSala v. Bordier et Cie*, 452 F. Supp. 2d 575, 582-83 (D.N.J. 2006). The district court then found that SLUSA did preclude the action, but only because the trust was formed for the primary purpose of litigation. *Id.* at 584.

On appeal, however, the Third Circuit adopted a fundamentally different analysis, as the court below acknowledged. The Third Circuit explained that the scope of SLUSA preclusion must be determined, not by "assess[ing] the 'primary purpose' of the particular trust at issue," but by looking to "the true 'injured party' on whose 'behalf' the litigation was brought." App.24. The Third Circuit then held that claims brought by a liquidating trust that originally belonged to a debtor corporation were *not* barred by SLUSA, but claims brought by the same trust that originally belonged to *more than 50 purchasers of a covered security* "would seem to take the form of a covered class action." 519 F.3d at 133-34, 137-38.[5]

Similarly, in *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1346 (11th Cir. 2008), where a pension plan sued on its own behalf, and the defendant argued that SLUSA precluded the claim because there were more than 12,000 plan participants, *Instituto de Prevision Militar v. Merrill Lynch & Co.*, 2007 WL 1239252 (S.D. Fla. Apr. 27, 2007), the Eleventh Circuit did not apply the "counting" provision to determine whether the plaintiff itself was entitled to a single-entity exemption. Instead the court correctly applied that provision to determine whether to treat the entity *on whose behalf* the claim was brought as more than one person.

As Judge Smith explained in his dissent below, "[i]t is apparent that" the Third Circuit in *LaSala* "would have held the present case to be barred by SLUSA. Here, it is undisputed that 'the assignors' were not a bankrupt corporation, but more than 50 bondholders. It is they, in *LaSala's* terms, who are the 'injured parties,' and this action is brought on

[5] The Third Circuit went on to find that SLUSA did not apply to the purchasers' claims because they were based on foreign law, not state law. *Id.* at 138, 143.

their 'behalf.'" App.32. Although the majority below attempted to sidestep this conflict, its effort to do so is wholly unconvincing. The majority tried to reconcile its holding that respondent's claims on behalf of more than 800 purportedly injured bondholders are *not* precluded by SLUSA with the Third Circuit's decision on the basis that the bondholders supposedly assigned their claims to the RGH estate before they were assigned to respondent. App.25-26. The majority so reasoned even though (1) the amended complaint itself alleges that the claims are brought "on behalf of" the bondholders who "suffered [the] damages the Trust seeks to recover" and will receive the entirety of "[a]ny money recovered" (App.107-08, 155, 202, 207), and (2) the Reorganization Plan Disclosure Statement states that the bondholders' claims are simply "deemed to have been assigned to the Debtor []to be further assigned to" respondent. App.513. The majority did not explain why SLUSA would permit the bondholders to avoid preclusion of their claims by "deeming" the claims to have been run through the Debtor or its estate. Nor did it explain its "assum[ption]" that the Third Circuit would have found that deemed assignment relevant (App.25), when the Third Circuit itself clearly stated that Congress intended to prevent securities-claims owners from avoiding SLUSA in precisely this way:

> [T]he statutory text and legislative history signal that the definition [of a "covered class action"] was designed to prevent securities-claims owners from bringing what are, in effect, class actions by assigning claims to a single entity . . . Put simply, Congress's goal was to prevent a class of securities plaintiffs from running their claims through a single entity . . . .

519 F.3d at 136; *see also Cape Ann Investors LLC v. Lepone,* 296 F. Supp. 2d 4, 12 (D. Mass. 2003) ("an assignment of a claim, as here, does not change its fundamental character").

The dissent below correctly recognized that such a "purely formal distinction" does "not alter the fact that the bondholders were the injured parties." App.32. Indeed, respondent alleges in its amended complaint that it is bringing its claims "on behalf of" the bondholders (App.107-08), which is the very language of SLUSA's "covered class action" definition. 15 U.S.C. § 78bb(f)(5)(B)(i)(I).[6]

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[6] In addition, as the dissent found, there is "nothing in the record to support the assertion that the RGH bankruptcy estate ever owned these claims." App.32. Presumably, the majority was relying on the statement in RGH's Disclosure Statement that "[o]n the Effective Date [of the Reorganization Plan], the . . . Creditor Litigation Claims . . . will be deemed to have been assigned to the Debtor (to be further assigned to the Liquidating Trust), without further action by any Person." App.513. But such a "deemed" assignment is not and should not be of any moment under SLUSA. The Disclosure Statement makes clear that respondent obtained title to those Claims on the same Effective Date. *Id.* The Debtor did not retain any interest

There is therefore a direct and fundamental conflict between the court below and the Third Circuit. Moreover, the question of what rule governs the interplay between SLUSA's definition of "covered class actions" and its "counting" provision has been further muddled because other courts have adopted different approaches that conflict with both the decision below and the Third Circuit. For example, the Appellate Division concluded in this case that even if the "counting" provision provides a single-entity exemption for *plaintiffs* bringing claims on behalf of more than 50 persons, the plain language of the provision dictates that the exemption not apply if the plaintiff was "established for the purpose of participating in the action," and does *not* condition that treatment on whether that purpose was its "primary" purpose. App.55. A fourth approach has applied the "single-entity exemption" and "primary" purpose test, but looked to the number of "beneficiaries" of the entity bringing the claim, not to the true injured parties whose claims the plaintiff was asserting, to determine whether the action has been brought on behalf of more than 50 persons. *See, e.g.*, *LaSala v. Bank of Cyprus Public Co.,* 510 F. Supp. 2d 246, 268-71 (S.D.N.Y. 2007) ("since damages are indisputably being sought on behalf of beneficiaries of the Trust numbering more than 50 persons, the Trust is a covered class action unless

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[Footnote continued from previous page]
in the Claims (App.270-71), and ceased to exist. App.283. Moreover, respondent alleges in its amended complaint that "[a]ny money recovered by the Trust on the bondholders' claims will be distributed to the bondholders." App.155.

the entity exception applies," even though the Trust asserts only the claims of a corporation); *LaSala v. UBS, A.G.*, 510 F. Supp. 2d 213, 235-36 (S.D.N.Y. 2007) (although the injured person whose claim the trust was asserting was a single company, the claim was precluded by SLUSA because the trust had more than 6000 beneficiaries and its primary purpose was litigation); *LaSala v. TSB Bank, PLC*, 514 F. Supp. 2d 447, 468-71 (S.D.N.Y. 2007) (a company's claims brought by a trust seeking damages on behalf of more than 50 trust beneficiaries are precluded by SLUSA because the trust was formed for the "primary" purpose of litigation).

As a result of this deep and persistent conflict, SLUSA will necessarily fail in its purpose to establish uniform standards for conduct affecting nationally traded securities. *Dabit*, 547 U.S. at 86-87. If the decision below is allowed to stand, petitioners will have to defend against costly litigation of state-law securities fraud claims seeking $500 million on behalf of hundreds of bondholders that would be barred under federal securities law, even though the same claims would have been dismissed had they been brought in the Third Circuit. The application of national standards should not depend on where suit is filed.

In addition to exacerbating this conflict, the decision below directly conflicts with the clear and unanimous instructions of this Court in *Dabit*. There, the Court held that SLUSA must be given a "broad construction" to effectuate Congress's intent that securities class actions be litigated in federal court exclusively under federal law, and that it would be "inappropriate for courts to create additional, implied exceptions" to SLUSA preclusion beyond the five "tailored exceptions" laid out in the statute. 547 U.S. at 85, 87-88. The court below ignored these principles, not to mention the statutory text, when it embraced the Ninth Circuit's "single-entity exemption." App.19-21. Moreover, by refusing to recognize the jurisdictional limitations of SLUSA, the court below has resolved (but incorrectly) an "important and difficult question[] of federal-state relations." *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 223 (1957). This Court — not a divided New York Court of Appeals — should have the last word on SLUSA's reach and the principles of construction specified in *Dabit*. By reviewing the decision below, this Court can restore the focus to the text of the statute and bring uniformity to this significant issue of federal law.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE IMPORTANT AND RECURRING QUESTION PRESENTED

The issue presented here is undeniably recurring. As the New York Court of Appeals correctly acknowledged, liquidating trusts like the one that brought this action "have grown in popularity because of the 'post-*Enron/Worldcom* world of Sarbanes-Oxley' in which we live, 'where claims might exist against the debtor's former insiders, accountants, financiers and others.'" App.15. Moreover, under the reasoning adopted below, the "single-entity exemption" from SLUSA preclusion would extend far beyond liquidating trusts to actions by any plaintiff entity that as assignee, or in a representative fashion, asserts securities claims on behalf of more than 50 persons. And this issue arises frequently not only (as here) in state court litigation, but also in litigation originally brought in federal court or removed there from state court. It arises with respect to efforts to avoid the limitations of not only the Securities Exchange Act of 1934 but also the Securities Act of 1933 (since SLUSA covers both of these important federal statutes).

Indeed, since *Dabit,* at least a dozen courts (including those cited above) have addressed the validity and scope of the single-entity exemption in reported decisions, with differing conclusions. *See also Picard v. HSBC Bank PLC,* 2011 WL 1544494, at *5 (S.D.N.Y. Apr. 25, 2011) (the "counting" provision applies to counting class members, and whether a SIPA trustee's lawsuit primarily on behalf of thousands of customers is a "covered class action" precluded by SLUSA or entitled to a single-entity exemption presents a "novel question"); *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC,* 454 B.R. 307, 313 (S.D.N.Y. 2011) ("Whether SLUSA applies when 'the original owners of the claim' number more than 50 — regardless of whether the claims are asserted by one entity — is an open question in this Circuit."); *Backus v. Conn. Cmty. Bank, N.A.,* 2011 WL 2183984, at *5 (D. Conn. Mar. 30, 2011) (the "counting" provision creates a single-entity exemption for plaintiff entities, but SLUSA precludes the action because there are no plaintiff entities and more than 50 plaintiffs); *Oregon ex rel.*

Or. 529 Coll. Sav. Bd. v. Oppenheimer Funds, Inc., 2009 WL 2517086, at *4 (D. Or. Aug. 14, 2009) (the "counting" provision creates a single-entity exemption for plaintiff entities, and a claim by the Oregon 529 College Savings Board on behalf of thousands of plan participants is not precluded by SLUSA); *Lee v. Marsh & McLennan Cos.*, 2007 WL 704033, at *4 (S.D.N.Y. Mar. 7, 2007) (the "counting" provision provides a single-entity exemption for plaintiff entities); *Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., LLC,* 2007 WL 1456204, at *6 (D.N.J. May 15, 2007) (a corporation bringing a claim on behalf of itself that did not purport to represent a class of its shareholders should be treated as one person under the "counting" provision).

Nor can there be any serious doubt that the issue presented is important. As this Court explained in *Dabit*, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." 547 U.S. at 78. That interest will be significantly undermined if the ruling of the influential New York Court of Appeals is left in place, because it hands plaintiffs a simple, easily manipulable blueprint to evade SLUSA's commands. The court below's extremely broad single-entity exemption from SLUSA for claims seeking damages on behalf of more than 50 persons or a class, merely because the entity bringing the claim is a "single entity," gives plaintiffs carte blanche to escape SLUSA preclusion with the stroke of a pen. All they need do is assign their claims to a single plaintiff entity, as the bondholders did in this case. There is every reason to believe such assignments to entities that purport to meet the "primary" purpose test, perhaps to pre-existing shell corporations, will become the norm. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) ("it would be particularly unwise" to create a rule that as a "practical matter . . . could easily be overcome" by injured parties "assign[ing] all of their claims" to a trust). "Parties' ability to do this would not turn on any factor related to preventing frivolous securities litigation, but on the creativity of the parties' lawyers . . ." *LaSala*, 519 F.3d at 137. Thus, the New York Court's decision will have the perverse effect of restoring loopholes that SLUSA was designed to close.

This case is a textbook example. Even though all federal securities law claims by the bondholders against petitioners are indisputably barred by the federal statute of limitations, and all of their "holder" claims are indisputably barred under federal securities laws by *Blue Chip Stamps*, the same bondholder claims are now being pursued under state law through the simple expedient of assigning them to a trust — in what is in fact, if not in name, a class action. That clearly is not what Congress had in mind. *Dabit*, 547 U.S. at 86 ("[C]lass actions brought by holders pose a special risk of vexatious litigation. It would be odd, to say the least, if SLUSA exempted that particularly troublesome subset of class actions from its pre-emptive sweep.").

As the Solicitor General and the SEC have correctly explained, "[t]he need for uniform national standards, like the text of SLUSA's preemption provision, does not turn on the identity of the plaintiff in a particular case." Brief for the United States, *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Dabit*, 2005 WL 3048038 at *27. Yet the court below's single-entity exemption does exactly that. Moreover, by making SLUSA preclusion turn on the identity of the plaintiff, the decision below has the untoward effect of permitting the application of differing state-law standards in cases brought by plaintiff entities that were not established for the "primary" purpose of bringing the lawsuit, and requiring the application of uniform national standards only if the plaintiff entity had that "primary" purpose. That "deprive[s] the uniform national standards of any semblance of uniformity." *Id.* at *28.

If allowed to stand, the New York Court's "single-entity exemption" will have other unfortunate consequences, including on bankruptcy proceedings. For example, if bondholders and other securities holders can circumvent SLUSA merely because the issuer has declared bankruptcy, they will often have an incentive to force such entities into bankruptcy so that the liquidating trust device can be used to avoid the constraints of federal securities law. These "practical consequences" "provide a further reason to reject" the lower court's approach. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *see also Butner v. United States*, 440 U.S. 48, 55 (1979) (a party should not "receive[e] a windfall merely by reason of the happenstance of bankruptcy").

Indeed, this Court's guidance is also needed on the question of how SLUSA applies to trusts in the bankruptcy setting, which in itself is an issue of great importance "in the administration of the bankruptcy laws." *Reading Co. v. Brown,* 391 U.S. 471, 475 (1968). Both the court below and the Ninth Circuit grounded their decisions on the notion that the "single-entity exemption" was needed to avoid "potentially depriv[ing] many bankruptcy trustees of the ability to pursue state-law securities fraud claims on behalf of an estate." App.20 (quoting *Smith*, 421 F.3d at 1007-08). Neither the Ninth Circuit nor the majority below explained, however, why a bankruptcy trustee cannot bring the claims *of a single injured debtor* if SLUSA is applied, according to its terms, to preclude claims "on behalf of" more than 50 injured persons. As Judge Smith explained in dissent, while a trustee in bankruptcy "sues, ordinarily, on behalf of a single entity," the RGH Liquidating Trust is "no different than any shareholder class representative" and brings "claims assigned to it for the purpose of suit by more than 50 potential plaintiffs." App.30, 33; *see also* note 4 above. Judge Smith correctly concluded that "[n]othing in either the language or the legislative history of SLUSA suggests that Congress meant to grant an exemption to any 'liquidation vehicle' that is doing precisely what SLUSA was enacted to prevent." App.30. *See also Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186, 189 (1907) ("The character of [claims in a bankruptcy proceeding] was fixed when they were incurred, and could not be changed by an assignment").[7]

Finally, for at least three reasons this case presents an ideal vehicle to resolve the conflict and confusion in the lower courts over the validity and scope of the so-called "single-entity exemption" to SLUSA. First, this dispositive legal issue is squarely presented here because it is undisputed that all of the other preconditions for SLUSA preclusion are present. Second, this issue has been exhaustively addressed by three layers (and 13 judges) of the New York judiciary, which took strikingly divergent views (7 judges adopting the majority's exemption and 6 rejecting it on two different grounds). Third, there is a statutory roadblock to review by the federal courts of appeals when district courts apply SLUSA too narrowly and therefore improperly remand to state court. *See* 28 U.S.C. § 1447(d). That roadblock is not present here.[8]

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[7] Notably, the decision below has already been cited by a Special Master as establishing that bankruptcy trustees *and* liquidating trusts are entitled to "entity treatment." *In re Refco Sec. Litig.*, 2011 WL 4035819, at *4 (S.D.N.Y. Sept. 6, 2011).

[8] Federal courts of appeals also have few opportunities to review district court decisions *declining* to remand cases under SLUSA, since those decisions are interlocutory and thus not appealable under 28 U.S.C. § 1291 unless there is a final judgment, and most certified class actions result in settlement. Commentators have lamented the resulting scarcity of "precedent governing district court interpretations of SLUSA" "to grant or deny remand," and the forum-shopping it has encouraged. Michael Serota, *(Mis)Interpreting SLUSA: Choosing the Jurisdictional Loophole in Federal Securities Class Actions*, 7 Berk. Bus. L.J. 162, 166 (2010).

III. THE DECISION BELOW IS WRONG

Review is also warranted because the New York Court's holding is deeply flawed. It defies the plain language of SLUSA, under which the relevant question is whether the plaintiff is bringing claims "on behalf of more than 50 persons," not whether the plaintiff itself should be treated as one person under the "counting" provision. 15 U.S.C. §78bb(f)(5)(B). SLUSA precludes "any single lawsuit" under state law alleging a misrepresentation or omission in connection with the purchase or holding of a covered security "in which damages are sought on behalf of more than 50 persons or prospective class members." This lawsuit indisputably seeks damages on behalf of more than 50 bondholders. As Judge Smith recognized, that should have been the end of the matter. Moreover, it is beyond dispute that the bondholders' claims would have been barred by SLUSA if brought by the bondholders themselves in a single lawsuit. Nothing in SLUSA, its purpose or its legislative history suggests that the result should be different if a direct or indirect assignee instead brings the claims on behalf of the bondholders.

In concluding otherwise, the court below relied heavily on SLUSA's "counting" provision. But as both the text and title make abundantly clear, the "counting" provision serves the much more limited role of addressing the "counting of certain class members" that are entities on whose behalf damages are sought, in order to determine whether such entity "class members" will be counted as more than one person for SLUSA's numerosity purposes. *See INS v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502

U.S. 183, 189 (1991) (text of a section of a statute must be construed in light of the specific purpose identified in its title); *Morrison v. Nat'l Austl. Bank Ltd.,* 130 S. Ct. 2869, 2886 (2010) (Court's "function" is "to give the statute the effect its language suggests"). Here, for example, the "counting" provision governs whether Wexford Capital LLC, one of the bondholders on whose behalf respondent seeks damages (App.149), should count as one entity or as the number of its members. Contrary to the New York Court's view, the "counting" provision is *not* an exception to the "covered class action" definition and does not provide a "single-entity exemption" for an action by a plaintiff, like respondent, that seeks damages on behalf of more than 50 persons. Thus, the application of that provision to respondent is simply "not relevant to this case," as the dissent below pointed out, "because even if the Trust is 'treated as one person' it is still suing 'on behalf of' more than 50 others — just as a class representative may be one person but a class action will still be barred by SLUSA." App.28-29.[9]

[9] The Third Court explained in *LaSala* that there is additional language in SLUSA's definition of a "covered class action" that confirms that its reference to "persons or prospective class members" means "the original owners of the claim — those injured by the complained-of conduct," and not an assignee who suffered no injury. 519 F.3d at 134. Thus, a "covered class action" includes "any single lawsuit in which (1) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to *those persons or members of the prospective class* . . . predominate over any questions affecting only individual persons or members." 15 U.S.C. § 78bb(f)(5)(B)(i). The italicized language plainly refers to "the assignors of a claim, not the assignee," because only

Even if, contrary to its plain language, the "counting" provision could be construed as creating a "single-entity exemption" for plaintiffs, the decision below made that exemption far too broad, by including plaintiffs "established for the purpose of participating in the action," 15 U.S.C. § 78bb(f)(5)(D), as long as that was not their "primary" purpose. This Court has explained that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009). *See also 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) (courts must look to "what Congress has written . . . neither to add nor to subtract, neither to delete nor to distort."). Moreover, because the "primary" purpose test is subjective and readily manipulable by securities plaintiffs and their counsel, it undermines the congressional goals of closing loopholes to the PSLRA and establishing "objective criteria" to define a covered class action. *See* S. Rep. No. 105-182 at 5 (1998).

The court below relied heavily on the Ninth Circuit's "primary" purpose test, but *Smith* performed only a cursory analysis of the issue, and the three rationales it gave are plainly defective. First, the Ninth Circuit stated its judge-made standard was necessary to avoid "potentially

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"those injured by the complained-of conduct" "might have common questions of law or fact related to the claim that predominate over individual questions." 519 F.3d at 134.

depriv[ing] many bankruptcy trustees of the ability to pursue state-law securities fraud claims on behalf of an estate." 421 F.3d at 1008. As explained in Point II above, however, SLUSA, properly construed, does not preclude a trustee from acting on behalf of a single estate where the debtor is truly the injured party. Second, the Ninth Circuit focused on the reference to "*the* purpose" in the "counting" provision, *id.,* but as the Ninth Circuit itself has held in other contexts, "the purpose" does not invariably mean "the primary purpose."[10] Finally, the Ninth Circuit stated that the *Cape Ann* court "suggested" the "primary" purpose test, 421 F.3d at 1007, but that too is incorrect. While *Cape Ann* did observe that "[t]he Trust Agreement describes the primary purpose" of the trust in that case "as 'prosecuting the Causes of Action contributed to it,'" the court did not base its holding on that fact. Instead, the court found the trust's claims on behalf of more than 50 shareholders were barred by SLUSA because its role

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[10] For example, the Ninth Circuit ruled in *United States v. Banks*, 514 F.3d 959, 966 (9th Cir. 2008), that the prohibition in 18 U.S.C. § 1959(a) of conduct "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise" applies when that purpose is not "the sole (or exclusive or primary) purpose"; any other reading "does violence to ordinary usage, and . . . [a] more natural reading would recognize that in ordinary usage, doing X 'for the purpose of' Y does not imply that Y is the exclusive purpose." *See also United States v. Hughes*, 282 F.3d 1228, 1231-32 (9th Cir. 2002) (rejecting argument that U.S.S.G. § 2G1.1(c)(1)'s reference to conduct for "the purpose of producing a visual depiction" applies only where that is the primary purpose, and finding it applies where that is "*one* of the defendant's purposes") (emphasis by the court).

was "no different than that of any shareholder class representative." 296 F. Supp. 2d at 10.

The court below also erred in purporting to find support for its single-entity exemption in SLUSA's legislative history. The majority relied on a single sentence in a Senate Committee Report — concerning a draft of SLUSA — to find that Congress intended to exempt from SLUSA preclusion any persons or entities "duly authorized by law, other than a provision of state or federal law governing class action procedures, to seek damages on behalf of another person or entity." App.13-14. But that language was *not* incorporated into SLUSA. More generally, this Court has repeatedly cautioned against "judicial reliance on legislative materials like committee reports." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). *See also United States v. Gonzales*, 520 U.S. 1, 6-8 (1997) (declining to change a "straightforward statutory command" based on a "single sentence buried in the legislative history").

Even if this snippet of legislative history were entitled to any weight, it would not support the single-entity exemption. The cited-sentence referred to a change in the "class action" definition in §78bb(f)(5)(B); it did *not* address the "counting" provision at all.[11] Moreover, it referred only to

[11] The draft of SLUSA under consideration before the Senate Committee issued its Report defined a covered "class action" in three ways, including a lawsuit where "(C) One or more of the parties seeking to recover damages did not personally authorize the filing of the lawsuit." S. 1260, 105th Cong., § 2(a)(1) (Oct. 7, 1997). The sentence in question addressed this definition (C),

claims by a "trustee in bankruptcy" and certain others "on behalf of another person or entity." App.14. Neither the sentence nor the Report expressed any concern about SLUSA preclusion of claims by liquidating trusts or other entities seeking damages *on behalf of more than 50 injured persons*, such as respondent here.[12] As the dissent below explained, "[n]othing in either the language or the

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which would have included an action by a trustee in bankruptcy on behalf of *one* other person and therefore extended far beyond what is normally considered a "class action." Definition (C) was eliminated in the revised draft of the bill issued contemporaneously with the Report. S. 1260, 105th Cong. (May 4, 1998). *See also LaSala,* 519 F.3d at 136; App.30 (as a result of the Report, "language in the draft legislation that might have been read to bar an action by a trustee in bankruptcy was deleted.").

[12] There is no suggestion in the Report that it was addressing the possibility of a claim by a bankruptcy trustee *on behalf of creditors*. "Congress can hardly have been unaware," *Dabit*, 547 U.S. at 85, that this Court had held in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 432 n.22 (1972), that, under the bankruptcy statute, a bankruptcy trustee "only has authority to pursue claims belonging to the estate," and does not have standing to pursue creditors' claims. Indeed, Congress had specifically rejected an amendment to the bankruptcy statute that would have allowed a bankruptcy trustee to assert such claims. *See* H.R. Rep. 95-595, 95th Cong., 1st Sess. 370-71 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6326, 6327. Moreover, when the Report was issued, several circuits had ruled that a bankruptcy trustee could not assert creditors' claims even as their assignee. *See Williams v. Cal. 1st Bank*, 859 F.2d 664, 666-67 (9th Cir. 1988); *Cissell v. Am. Home Assurance Co.,* 521 F.2d 790, 792 (6th Cir. 1975); *In re Petroleum Corp. of Am.*, 417 F.2d 929, 934 (8th Cir. 1969).

legislative history of SLUSA suggests that Congress meant to grant an exemption to any 'liquidation vehicle' that is doing precisely what SLUSA was enacted to prevent." App.30. Quite the contrary, the paragraph immediately following the cited sentence stated that SLUSA should be "interpreted broadly" to prevent all types of "procedural devices" that could be used to "circumvent" it. S. Rep. 105-182 at 6.[13] Review is warranted to correct an erroneous reading of SLUSA that would defeat Congress's purposes.

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[13] After the Report was issued, the bill was amended to add exemptions for certain actions, such as actions brought by indenture trustees against issuers and by state pension plans *See* H.R. 1689, 105th Cong. (July 22, 1998); H.R. Rep. No. 105-803, at 13 (1998). But no "single-entity exemption" was added, nor any exemption for all actions by bankruptcy trustees or liquidating trusts. *See United States v. Ron Pair Enters.,* 489 U.S. 235, 242 (1989) ("When Congress wanted to restrict the application of a particular provision of the Code," it knew how to do so).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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