No. 11-1173

IN THE

Supreme Court of the United States

CHRISTOPHER BROWN,

Petitioner,

v.

JOHN P. CALAMOS, SR., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY BRIEF FOR THE PETITIONER

The Seventh Circuit read petitioner's complaint to contain a background assertion that respondents made a misrepresentation, and acknowledged that the complaint's claims do not rely on that assertion. The court nonetheless held that the Securities Litigation Uniform Standards Act (SLUSA) requires dismissal of the complaint with prejudice. The court held that SLUSA required it to speculate that the asserted misrepresentation could become an issue in the suit because petitioner might later convert the background assertion into a claim of fraud. The court recognized that its ruling conflicts with the Third Circuit's holding that such background assertions do not trigger SLUSA preemption, Pet. App. 8a-9a, 13a, as well as with several circuits' holding that any dismissal should be without prejudice to permit the plaintiff to remove any assertion of a misrepresentation and proceed with the suit, *id.* 9a-10a.

This disuniformity invites forum shopping in nationwide class actions. Respondents moreover do not deny that the question presented has great importance or that this Court will lack jurisdiction to consider many other cases in which the question arises. Pet. 18-20. Respondents instead seek to recharacterize petitioner's complaint and rewrite the Seventh Circuit's decision, as if petitioner's complaint actually asserted a fraud claim. Because that argument lacks the slightest merit, certiorari should be granted.

I. Petitioner's Claims Do Not Allege That Respondents Made Any Misrepresentation.

Petitioner's complaint – reproduced in the Petition Appendix at 20a-59a – speaks for itself. Respondents "breached the fiduciary duties owed to the Fund's common shareholders" by "caus[ing] the Fund to partially redeem AMPS and replace it with less favorable debt financing," in order "to further their own interests and those of the Fund's investment advisor and its affiliates, not the interests of the common shareholders." Pet. App. 23a-24a (¶ 3). "The redemptions benefited the holders of the AMPS, thereby favoring one class of shareholders over another, in violation of the duties of the Individual Defendants toward the disadvantaged shareholders." *Id*. 38a (¶ 28). The complaint's "[c]auses of action" detail "these duties," and how respondents violated them. *Id*. 51a-53a (¶¶ 41-47). Because such ordinary breach of fiduciary duty claims do not "alleg[e] a misrepresentation or omission of a material fact," 15 U.S.C. § 78bb(f)(1), SLUSA does not authorize dismissal of the complaint.

The forty-four paragraphs of the complaint's lengthy background section, Pet. App. 27a-49a, include a single sentence stating: "The Fund's public statements indicated that the holders of its common stock could realize, as one of the significant benefits of this investment, leverage that would continue indefinitely, because, as described above, the term of the AMPS was perpetual." *Id.* 30a (¶ 13). Whatever the sentence means, the relevant point is that it plays no role in petitioner's claims. Indeed, even respondents do not dispute that petitioner's claims

are *entirely* unaffected by the truth of respondents' statements. Pet. 30; BIO 31 n.15.

Respondents nonetheless say that "[a] central theme of petitioner's complaint is that the Fund created a false expectation in the minds of investors," BIO 2, which "lured investors to the Fund's common shares with a promise of favorable financing that would last 'indefinitely,'" *id.* 18. But they cite no language in the complaint making those assertions, because not one word anywhere in the complaint alleges that respondents' statements created any expectation, induced reliance, or harmed anyone. Manifestly, the lone background sentence respondents cite is not a "theme" of the complaint.[1]

II. The Seventh Circuit Read The Complaint To Contain A Background Allegation Of A Misrepresentation, Not To Claim Fraud.

1. The Seventh Circuit accurately recounted petitioner's claims in three lengthy paragraphs spanning Petition Appendix pages 6a-7a. In sum, "the fund redeemed the AMPS, despite the untoward consequences for the common shareholders," "*in*

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[1] Respondents' two remaining points lack merit. First, *contra* BIO 11, whether a claim is subject to the Class Action Fairness Act, 28 U.S.C. § 1453(d)(1), does not affect whether it "allege[s]" a "misrepresentation" under SLUSA. *See, e.g.*, *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012). Second, *contra* BIO 18-20, whether Delaware law – which the Seventh Circuit discussed only in dictum, *see id.* 9-10 n.7 – requires that petitioner's non-fraud claim proceed as a derivative action is no basis to construe the complaint to assert a claim of fraud that it does not assert – indeed, that it disavows. *See* Pet. 34; Pet. App. 24a (¶ 4).

breach of its fiduciary obligations to the fund's common shareholders, in order to placate banks and brokers." *Id.* (emphasis added). The court recognized that the truth of respondents' statements was *irrelevant* to petitioner's claims because, even if respondents "had made full and accurate disclosure," "these disclosures would have been ineffectual against a claim of breach of the duty of loyalty because that duty is not dissolved by disclosure ('we are disloyal – *caveat emptor*!')." *Id.* 14a-15a.

Having acknowledged petitioner's actual claims, the court construed the one background sentence as "[n]evertheless . . . interpreted most naturally as alleging a misrepresentation," because if petitioner did reverse course and pursue a claim of fraud "a reasonable jury *might* find that the passage *insinuated* that a significant benefit of investing in the fund was that the investor would obtain leverage indefinitely because the AMPS had no maturity date." *Id.* 8a (emphases added). Further, the court read into the complaint an "implicit[]" allegation of an "omission to state that the fund might at any time redeem the AMPS on terms unfavorable to the common shareholders." *Id.* But again, the court did not believe either allegation played a role in petitioner's claims. *Id.* 6a-7a.

The Seventh Circuit then addressed the recurring question of how SLUSA applies to assertions of misrepresentations that do not underlie any claim: Does such a complaint "alleg[e] a misrepresentation"? 15 U.S.C. § 78bb(f)(1). The Seventh Circuit broadly held that the statute requires dismissal whenever "the allegations of the complaint make it likely that an issue of fraud will

arise in the course of the litigation." Pet. App. 13a. The court then reached even further to hold that SLUSA requires dismissal whenever the complaint's actual, non-fraud claims might fail, reasoning that the plaintiff *might* later convert the background statements into a new actionable claim to save his case. *Id.* 18a.

The Seventh Circuit speculated about the merits of petitioner's claim, which it had no jurisdiction "to touch." Pet. 32-33 (quoting *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006)). Acting *sua sponte* and citing no relevant authority, *see id.* 33-34, it opined that petitioner's claims might fail because fiduciaries supposedly may disadvantage one fund to benefit other funds that have not been created and for which they have not been named fiduciaries. Pet. App. 17a-18a. The possibility his claim might fail, in turn, might cause petitioner to try to introduce the claim of fraud that his complaint expressly disavows. So, "without the allegation that the . . . Fund misrepresented the characteristics of its capital structure, a charge of breach of loyalty *might not be plausible*. The fraud allegations *may* be central to the case." *Id.* 18a (emphasis added) (citations omitted).

As discussed in the petition, at 29-31, and the *amicus* brief, that strained reading of SLUSA violates basic principles of federalism by extinguishing long-standing state-law remedies in an area of traditional state regulation. The Seventh Circuit held that the complaint's mere recitation of a statement by respondents implies that statement was false, and that petitioner's allegation of a conflict of interest implies that respondents failed to disclose that

conflict. Pet. App. 8a. That holding applies equally to the many complaints that, although they allege non-fraud claims, either note something the defendants said or assert that the defendants had a conflict of interest. *See* Pet. 18-19 n.1 (collecting cases).

2. Respondents' contrary argument that the Seventh Circuit read petitioner's complaint to actually assert a *claim* of fraud depends on ripping three conclusory sentences from the context of the court's decision.

Respondents assert that the court held "that the suit 'is . . . barred by SLUSA under any reasonable standard,'" BIO 11 (quoting Pet. App. 18a), ellipsing out the critical word "therefore," which refers to the court's holding two sentences earlier that SLUSA requires dismissal of the complaint because petitioner's "charge of *breach of loyalty* might not be plausible." Pet. App. 17a (emphasis added). The Seventh Circuit's statement "that, although petitioner's suit was cast in terms of breach of fiduciary duty, the breach 'appears to rest on an allegation of fraud, as is often the case,'" BIO 12 (quoting Pet. App. 18a), is the conclusion to the same paragraph and rests on the same rationale.

Respondents also note that "the court said, '[t]he allegation of fraud *would be* difficult and maybe impossible to disentangle from the charge of breach of the duty of loyalty that the defendants owed their investors.'" BIO 12 (quoting Pet. App. 13a) (emphasis added). That statement, which acknowledges that petitioner's actual claim is for "breach of the duty of loyalty," refers to what "would" happen in the scenario in which the plaintiff converts the

background allegation into an actionable claim. Respondents thus omit the *reason* the court deemed that claim "entangle[d]" with the implication of the one background sentence: the court held that SLUSA is triggered by the mere possibility that petitioner's claims will fail, potentially leading him to try later to introduce a claim of fraud. Pet. App. 18a.

III. Without Their False Characterization Of The Facts, Respondents Have No Answer To The Circuit Conflicts Acknowledged By The Seventh Circuit.

A. The Ruling Below Exacerbates The Significant Conflict Over Whether And When Background Assertions Require The Dismissal Of A Complaint.

The courts of appeals are split three ways over the recurring question of SLUSA's application to complaints that include background assertions of misrepresentations that are not a basis for the plaintiff's claims. *See* Pet. 20-24.

The ruling below cannot be reconciled with the Third Circuit's holding that SLUSA applies only when an alleged misrepresentation is "the factual predicate to a legal claim." *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008). The *very point* of that rule is that mere background statements do not trigger SLUSA preemption. *Id.*

Respondents parrot the Seventh Circuit's suggestion that "the Third Circuit 'distinguishes . . . between an inessential factual allegation . . . and a factual allegation that while not a necessary element of the plaintiff's cause of action *could be critical* to his success in the particular case,'" BIO 16 (quoting Pet.

App. 9a) (emphasis added), which was the basis for the Seventh Circuit's statement that petitioner's complaint would be dismissed under a rule "*close* to the Third Circuit's," Pet. App. 13a (emphasis added). Even the Seventh Circuit did not assert that the Third Circuit would dismiss petitioner's complaint under SLUSA. Further, that "could be critical" formulation is the Seventh Circuit's invention. The Third Circuit would actually hold that SLUSA does not require dismissal of petitioner's complaint for the simple reason that "the fact of a misrepresentation *must* be one that gives rise to liability," whereas a background statement "need not be proved." *LaSala*, 519 F.3d at 141 (emphasis added). That court does not "decid[e] whether [the non-fraud] claims are adequately pleaded," *id.* at 130; instead, it holds that if the plaintiff later attempts to pursue a fraud claim, the district court "may reconsider [SLUSA's applicability] at that time," *id.* at 141 n.25.

The Seventh Circuit's holding also conflicts with the precedent of the Sixth Circuit, which has twice held that SLUSA requires dismissal of complaints containing background assertions of misrepresentations, because the statute applies whenever "the complaint includes these types of allegations [*i.e.*, misrepresentations and omissions], pure and simple," whether or not the claims are "dependent" on those allegations. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009); *see also Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549, 555 (6th Cir. 2011). Respondents say petitioner argued below that the complaints in the Sixth Circuit's cases asserted fraud *claims*, BIO 16, but that does not change the Sixth Circuit's *holding*. Even assuming that court could have applied a

narrower rule, the Seventh Circuit correctly recognized that it instead adopted a sweeping holding that binds it and the district courts in that circuit.

B. The Seventh Circuit's Holding That Petitioner's Complaint Must Be Dismissed With Prejudice Warrants This Court's Review.

In the district court, respondents moved to dismiss petitioner's complaint "with prejudice." Defendants' Joint Motion to Dismiss the Complaint at 5, *Brown v. Calamos*, No. 10-cv-06558 (N.D. Ill. 2010). The court agreed and "dismissed [petitioner's] suit, with prejudice." Pet. App. 3a. That order precluded petitioner from refiling the complaint in state court without the background statement, or moving to file an amended federal complaint.

Petitioner appealed, arguing that his suit could proceed without the background statement, which "could be removed entirely from the Complaint without any effect on Plaintiff's claims," because those claims "do not in any way depend on these allegations, which could be excised from the Complaint without any effect on the viability of Plaintiff's claims." Pet. C.A. Br. 16, 21-22. Petitioner also relied, Pet. C.A. Br. 14 n.6, on both *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005) (Sotomayor, J.), *vacated on other grounds*, 547 U.S. 1 (2006), and *In re Lord Abbett Mutual Funds Fee Litigation*, 553 F.3d 248 (3d Cir. 2009), both of which held that a complaint containing assertions of misrepresentations should be dismissed under SLUSA without prejudice.

The Seventh Circuit obviously understood petitioner to have pressed the question whether the

dismissal should be without prejudice. *See* Pet. App. 18a-19a. But all that matters is that the Seventh Circuit "passed upon" the question, which is therefore before this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Respondents' contrary argument would permit courts to *sua sponte* adopt binding rules that give rise to significant circuit conflicts, while evading this Court's review.

Respondents argue that petitioner would in any event not be permitted to amend his complaint because he "failed to raise the issue of amendment in the" district court first. BIO 22. But respondents conflate the issue on which the circuits are split (whether SLUSA "allows the removed suit to be dismissed without prejudice," Pet. App. 10a) with a further form of relief (whether petitioner can proceed in federal court on an amended complaint). If the complaint is dismissed "without prejudice," *Dabit*, 395 F.3d at 47, petitioner does *not* need the district court's permission to amend his complaint: he can remove the allegation and return to *state* court, because the only basis for federal jurisdiction over this case is SLUSA. As the Seventh Circuit expressly recognized, if the background allegation were removed, the complaint "*could be refiled*," as opposed to "being forever barred, which would be the effect of our affirming the district court's judgment." Pet. App. 15a (emphasis added).

But in any event, whether petitioner can seek leave to amend is a question for the lower courts to decide on remand from a decision of this Court. It is

not a basis for the ruling below, and it is not encompassed within the question presented.[2]

Although the Seventh Circuit acknowledged the circuit split, respondent argues that the petition "conflates Circuit decisions addressing two analytically distinct issues: first, whether SLUSA requires the dismissal of *all* claims asserted in a complaint notwithstanding the presence of some claims that are not precluded by SLUSA; and second, whether a claim or claims otherwise precluded by SLUSA may be amended to state a claim not within

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[2] It would, however, be another reason to grant certiorari, because that question has split the circuits, with en banc rulings on both sites of the conflict. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 544 (11th Cir. 2002) (en banc) (describing the conflict and holding that the plaintiff must first seek leave to amend in the district court). The better rule is the one applied by the Third and Ninth Circuits, the latter "in a line of cases stretching back nearly 50 years": the district court must grant the plaintiff leave to amend, "even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Loo*, 203 F.3d 1122 (9th Cir. 2000) (en banc); *see also Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004) ("[E]ven when a plaintiff does not seek leave to amend, if a complaint is vulnerable to . . . dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile."). The Third and Ninth Circuit cases cited by respondents are inapposite. *See Ramsgate Court Townhome Ass'n v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002) (district court did not abuse discretion in denying leave to amend when plaintiff *sought* leave but did not describe offer any explanation of the amendment); *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000) (*defendant* decided not to amend answer, and instead "stuck so firmly to its contention that it did not have to answer [a particular] averment").

the scope of the Act." BIO 21. Respondents do not dispute that – but for their erroneous claim of waiver – the ruling below squarely conflicts with the latter decisions.

Respondents distinguish the former cases based only on the premise that *all* petitioner's claims include "fraud allegations." *Id.* 22. As discussed *supra*, that premise is false. The courts in respondents' first claimed category (the Second, Third, and Ninth Circuits), which hold that a plaintiff may delete SLUSA-precluded claims and proceed on claims that do not allege fraud, would obviously allow petitioner to take the more modest step of removing an extraneous background sentence to proceed on his fiduciary duty claims. *See also Madden v. Cowen*, 576 F.3d 957, 966 (9th Cir. 2009) (citing *Green v. Ameritrade*, 279 F.3d 590, 599-600 (8th Cir. 2002)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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