No. __-__

IN THE

Supreme Court of the United States

CHADBOURNE & PARKE LLP,
Petitioner,

v.

SAMUEL TROICE, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA") precludes most state-law class actions involving "a misrepresentation" made "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The circuits, however, are divided over the standard for determining whether an alleged misrepresentation is sufficiently related to the purchase or sale of a covered security to satisfy the "in connection with" requirement. The Fifth Circuit in this case adopted the Ninth Circuit standard and held that the complaint here was not precluded by SLUSA, expressly rejecting conflicting Second, Sixth, and Eleventh Circuit standards for construing the "in connection with" requirement, all of which would result in SLUSA preclusion here.

Additionally, and also in conflict with several other circuits, the Fifth Circuit held that SLUSA does not preclude actions alleging aiding and abetting of fraud in connection with SLUSA-covered security transactions when the aiders and abettors themselves did not make any representations concerning a SLUSA-covered security.

The questions presented are:

1. Whether SLUSA precludes a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities.

2. Whether SLUSA precludes class actions asserting that defendants aided and abetted SLUSA-covered securities fraud when the defendants themselves did not make misrepresentations about the purchase or sale of SLUSA-covered securities.

PARTIES TO THE PROCEEDING

Petitioner is Chadbourne & Parke LLP, a defendant below.

The other defendants below are Proskauer Rose LLP, Thomas V. Sjoblom, and P. Mauricio Alvarado.

Respondents, plaintiffs below, are Samuel Troice, Horacio Mendez, Annalisa Mendez, and Punga Punga Financial, Ltd., individually and on behalf of a class of all others similarly situated.

RULE 29.6 DISCLOSURE

Petitioner Chadbourne & Parke LLP, a law firm, is a limited liability partnership with no parent company. No entity of any kind has 10 percent or greater ownership in Chadbourne & Parke LLP.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 675 F.3d 503, and is reprinted in the Appendix to the Petition ("App.") at 1a-41a. The opinion of the district court is unreported, and is reprinted at App. 42a-43a.

JURISDICTION

The court of appeals issued its decision on March 19, 2012 (revised on March 20), App. 1a, and denied a petition for rehearing on April 19, 2012, App. 46a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The Securities Litigation Uniform Standards Act ("SLUSA") provides: "No 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)(A).

STATEMENT OF THE CASE

A. Statutory Background

1. "In the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry," *Cent. Bank of Denver v.*

First Interstate Bank of Denver, 511 U.S. 164, 170 (1994), Congress enacted the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74, and the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881. While the 1933 Act is primarily concerned with "initial distributions of securities … the 1934 Act for the most part regulates post-distribution trading." *Cent. Bank*, 511 U.S. at 171. "The 1933 and 1934 Acts create an extensive scheme of civil liability," including enforcement authority delegated to the Securities and Exchange Commission ("SEC"), and various private causes of action. *Id.*

The "most familiar" of these provisions is § 10(b), "the general antifraud provision of the 1934 Act." *Id.* That provision, which is civilly enforced both by the SEC and privately through an implied cause of action, makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security … , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j. This Court has adopted a "broad construction" of the requirement that the fraud be "in connection with the purchase or sale" of a security, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84-85 (2006), explaining that this precondition is satisfied when the alleged fraud and any securities transaction "coincide." *United States v. O'Hagan*, 521 U.S. 642, 656 (1997). The requisite showing is simply "deception 'in connection with the purchase or sale of any security.'" *Id.* at 658.

At the same time, the Court has repeatedly emphasized that the scope of the implied *private* action available under § 10(b) (as opposed to the scope of

the statute itself, subject to SEC enforcement and criminal prosecution) must be construed narrowly. Various "policy considerations" justify limits on private securities-fraud enforcement, including most significantly the fact "that litigation under [§ 10(b)] presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737, 739 (1975). Accordingly, this Court has held that a private action may be brought only by purchasers or sellers of a security, not by its holders, *id.* at 754-55; that § 10(b) does not support an action for aiding and abetting securities fraud, *Cent. Bank,* 511 U.S. at 191; and that customers and suppliers who facilitate an issuer's fraud but make no misrepresentations themselves are not subject to private suit under § 10(b), *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 152-53 (2008).

2. Yet even as this Court was prescribing the foregoing limits on the § 10(b) private action, securities-fraud class actions continued to proliferate. In 1995, Congress itself responded by enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, which was "targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. "While acknowledging that private securities litigation was 'an indispensable tool with which defrauded investors can recover their losses,'" the House Conference Report accompanying the PSLRA "identified ways in which the class-action device was being used to injure 'the entire U.S. economy.'" *Id.* (quoting H.R. Rep. No. 104-

369 (1995) (Conf. Rep.)). "According to the Report, nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years." *Id.* (quoting H.R. Rep. No. 104-369 (1995) (Conf. Rep.)).

Title I of the PSLRA sought to stem those abuses. It amended both the 1933 and 1934 Acts and, among other things, "[i]ts provisions limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss." *Id.* (citing 15 U.S.C. § 78u-4, amending the 1934 Act). The PSLRA also heightened the pleading standards for claims brought under § 10(b). *See* 15 U.S.C. § 78u-4(b)(1), (2); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

3. The PSLRA made it significantly more difficult to bring vexatious securities class actions in federal court, but its success "had unintended consequences"—the new law "prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether" by instead filing in state court. *Dabit*, 547 U.S. at 82. In particular, Congress found "considerable evidence" that "a number of securities class action lawsuits ha[d] shifted from Federal to State courts." Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, § 2(1), (2), 112 Stat. 3227. "[T]his shift," Congress deter-

mined, had "prevented th[e] [PSLRA] from fully achieving its objectives." *Id.* § 2(3).

Accordingly, "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the" PSLRA, Congress enacted SLUSA, which was intended to establish "national standards" for class actions "involving nationally traded securities," SLUSA § 2(5), and to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.).

A principal way in which SLUSA achieved its stated purposes was by precluding certain securities class actions based on state law. SLUSA amended both the 1933 and 1934 Acts by creating the category of "covered class actions"—defined to mean simply a class action brought on behalf of more than 50 people, 112 Stat. 3232 (codified at 15 U.S.C. § 78bb(f)(4)(B))—and precluding any covered class action, either in state or federal court, "based upon the statutory or common law of any State or subdivision thereof" alleging, among other things, "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," i.e., a security listed on a national exchange. 112 Stat. 3230 (1934 Act amendment) (codified at 15 U.S.C. § 78bb(f)(1); definition of "covered security" codified at *id.* § 78bb(f)(5)(E))). This provision is referred to herein as the Preclusion Provision. SLUSA also included a Removal Provision, which assured that such state-law actions filed in state court could be removed to federal court, where they would be subject to immediate dismissal. 112 Stat. 3230

(1934 Act amendment) (codified at 15 U.S.C. § 78bb(f)(2)).

4. In *Dabit*, 547 U.S. at 74, 83-88, this Court held that the Preclusion Provision bars state-law fraud class actions brought by *holders* of a security, even though the holders themselves neither purchased nor sold a security, and even though holders have no private cause of action under § 10(b), *see Blue Chip Stamps*, 421 U.S. at 754-55. The Court explained that the SLUSA phrase "in connection with the purchase or sale of a covered security" must be given the same "broad construction" as the nearly identical "in connection with" language in § 10(b) itself, which requires only that the "fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Dabit*, 547 U.S. at 74, 85 (quoting *O'Hagan*, 521 U.S. at 651). This result also follows "from the particular concerns that culminated in SLUSA's enactment." *Id.* at 86. "A narrow reading of the statute," the Court explained, "would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]." *Id.* (quoting SLUSA § 2(5)). What is more, plaintiffs' "preferred construction also would give rise to wasteful, duplicative litigation," because "[f]acts supporting an action by purchasers under [§ 10(b)] (which must proceed in federal court if at all) typically support an action by holders as well, at least in those States that recognize holder claims." *Id.* Thus, the "prospect is raised … of parallel class actions proceeding in state and federal court, with different standards governing claims as-

serted on identical facts." *Id.* That result would "squarely conflict[] with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Id.* at 86-87 (quoting SLUSA § 2(5)).

Accordingly, securities-fraud claims brought by those who never purchased or sold a covered security nevertheless satisfy the "in connection with" requirement of the Preclusion Provision, so long as the underlying allegations of fraud fall within the "broad construction" of that phrase the Court has historically adopted. *Id.* at 89.

B. Factual Background And Procedural History

1. This case originated as three separate sets of actions, consolidated in the court of appeals, based on the same underlying alleged fraud—the multi-billion Ponzi scheme perpetrated by entities controlled by Allen Stanford, including the Stanford Group Company and (among others) its affiliate, Antigua-based Stanford International Bank ("SIB"). App. 6a. As a general matter, the Stanford entities' objective was to sell certificates of deposit issued by SIB, which they did by fraudulently "promising above-market returns and falsely assuring investors that the CDs were backed by safe, liquid investments"—i.e., liquid marketable securities sold on national exchanges—when in fact "SIB had to use new CD sales proceeds to make interest and redemption payments on pre-existing CDs, because it did not have sufficient assets, reserves and investments to cover its liabilities." *Id.* (quoting *Janvey v. Alguire*, 647 F.3d 585, 590 (5th Cir. 2011)). Though each of

the three sets of actions consolidated below concerns the same Stanford fraudulent scheme, none names any Stanford entity as a defendant.

a. The first set of actions was filed in Louisiana state court by a group of Louisiana investors—the *Roland* Plaintiffs—against the Stanford Trust Company, SEI Investment Company (the administrator of the Trust), and related entities (collectively, the "SEI Defendants"). App. 7a. The *Roland* Plaintiffs alleged that SIB sold CDs to the Trust, which in turn served as the custodian for all IRA purchases of the CDs, and that the SEI Defendants induced the *Roland* Plaintiffs and their IRAs to purchase CDs by falsely representing, among other things, that the CDs could be readily liquidated, that the CDs were subject to heavy regulation, that they would produce double-digit returns, and that SIB's "assets were 'invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks.'" App. 8a (quoting *Roland* complaint). The *Roland* Plaintiffs alleged various state-law causes of action. App. 7a. The SEI Defendants sought removal under the SLUSA Removal Provision (followed by dismissal under the Preclusion Provision). App. 8a.

b. The second set of actions was brought in federal court by a group of Latin American investors—the *Troice* Plaintiffs—against SIB's insurance brokers (the "Willis Defendants"), alleging violations of Texas law. App. 9a. Similar to the *Roland* case, the *Troice* Plaintiffs alleged that the Willis Defendants falsely stated, among other things, that "SIB's assets were invested in a well-diversified portfolio of highly

marketable securities," such as those of "strong multinational companies." *Id.* (quotation omitted). The Willis Defendants sought dismissal under the SLUSA Preclusion Provision.

c. The third action—the one from which this petition arises—was also brought by the *Troice* Plaintiffs, this time against the Stanford entities' attorneys (referred to below as the "Proskauer Defendants," which include Chadbourne & Parke LLP, the petitioner here). App. 9a. In contrast to the other actions, the *Troice* Plaintiffs did not allege that petitioner itself made any misrepresentations to them, but alleged only that petitioner aided and abetted the Stanford entities' fraud through its representation of those entities before the SEC. App. 9a, 40a. The underlying fraud that petitioners allegedly aided and abetted was the same fraud alleged in the other two cases.

The complaint alleges that the *Troice* Plaintiffs and those similarly situated purchased CDs because they were told, among other things, that "investments in the CDs were liquid and the CDs could be redeemed at any time because SIB … only invested in safe, secure and liquid assets." Second Amended Complaint ("SAC") ¶ 24. In particular, investors were told that SIB "focuses on 'maintaining the highest degree of liquidity as a protective factor for our depositors' and that the bank's assets are 'invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks.'" SAC ¶ 41. Further, Stanford Financial trained its brokers "to stress liquidity in their marketing pitches to prospective investors, telling

the brokers and advisors that 'liquidity/marketability of SIB's invested assets' was the 'most important factor to provide security to SIB clients.'" *Id.* Contrary to these representations, however, "SIB did not invest in a 'well-diversified portfolio of highly marketable securities.'" SAC ¶ 42. Instead, "significant portions of the bank's portfolio were misappropriated by SIB's sole shareholder, Allen Stanford, and used by him to acquire private equity and real estate." *Id.*

Both courts below determined that that the "highly marketable securities"—which were purported to be the "most important factor to provide security to SIB clients"—were traded on national exchanges, and were thus "covered securities" within the meaning of SLUSA.

2. All of these Stanford-related cases came before the same district judge, who decided to "select one case initially in which to address the applicability of [SLUSA]." App. 10a (quotation omitted). The district judge chose the *Roland* case, *id.*, and ruled that it was precluded by SLUSA, App. 73a.

Because the case was plainly a "covered class action" based on state law and alleging fraud, the only truly disputed question was whether the alleged fraud was "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). The dispute in this case arose because even though the SIB CDs were not themselves "covered securities," the "marketable securities" purportedly backing those CDs were.

In answering that question, the district court observed that federal circuit decisions "have used dif-

ferent variations" of the "in connection with" analysis. App. 63a. "Given this mélange of opinions and in the apparent absence of controlling Fifth Circuit authority on the subject," the district court chose to "follow the Eleventh Circuit's approach, which asks whether a group of plaintiffs premises their claim on either 'fraud that induced [the plaintiffs] to invest with [the defendants] … or a fraudulent scheme that coincided and depended upon the purchase or sale of securities.'" App. 64a (quoting *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) ("*IPM*")). The district court held that the SLUSA test was satisfied under both prongs of the Eleventh Circuit's test and dismissed the *Roland* complaint on that basis.

First, the court determined "that SIB led the Plaintiffs to believe that the SIB CDs were backed, at least in part, by SIB's investments in SLUSA-covered securities," and that plaintiffs' allegations make clear that this "belief induced the Plaintiffs to purchase SIB CDs." App. 64a-65a. The district court noted that the vast majority of district judges in the Southern District of New York have held that the similar Madoff "feeder fund" cases were also precluded by SLUSA, because Madoff (like the Stanford entities) falsely promised that he would use investors' funds to purchase SLUSA-covered securities. The "feeder fund" actions were not brought against Madoff himself, but instead against funds that invested with Madoff, by investors in those funds. App. 66a n.12.

Second, the court held that plaintiffs alleged a "fraudulent scheme that coincided and depended upon the purchase or sale of securities" because at least

one of the plaintiffs exchanged SLUSA-covered IRA investments to purchase the SIB CDs. App. 67a-70a.

b. In a separate order, the district court applied its reasoning in *Roland* to dismiss the *Troice* Plaintiffs' complaint against petitioner as SLUSA-barred. App. 42a-43a. The court reached the same conclusion as to the *Troice* Plaintiffs' suit against the Willis Defendants in a third order.

3. The Fifth Circuit consolidated the three sets of actions, and reversed as to each.

The court of appeals began by noting that "though the question of the scope of the 'in connection with' language under SLUSA is one of first impression in this circuit," "[s]ince *Dabit*, six of our sister circuit courts"—the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh—have tried to give dimension to the 'coincide' requirement" adopted in *Dabit*, which the court dubbed "not particularly descriptive." App. 13a, 16a. "Each of the circuits … has tried to contextualize the 'coincide' requirement," yet each adopted a "different articulation of the requisite connection between the fraud alleged and the purchase or sale of securities (or representations about the purchase or sale of securities)." App. 20a.

a. The Fifth Circuit first considered and rejected the Eleventh Circuit standard the district court had applied in finding preclusion. The first prong—whether the fraud "induced" plaintiffs to invest with defendants—improperly "[v]iew[s] the allegations from the plaintiff's perspective," the court explained, contrary to *Dabit*'s requirement that the fraud itself "coincide" with the purchase or sale of a covered security. App. 30a. The second prong—whether the

fraud "depends upon" the purchase or sale of a covered security—is "defendant-oriented" and thus more faithful to *Dabit*, the court reasoned, but is still inappropriate in that some alleged frauds that "coincide" with the purchase or sale of a covered security may not depend on them. App. 30a-31a.

For similar reasons, the court also rejected the Second Circuit standard, which finds SLUSA preclusion when "plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities." App. 31a (quoting *Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010)). Finally, the court rejected standards from the Sixth and Eighth Circuits as too indeterminate. *Id.* (citing *Segal v. Fifth Third Bank*, 581 F.3d 305, 310 (6th Cir. 2009); *Siepel v. Bank of Am.*, 526 F.3d 1122, 1127 (8th Cir. 2008)).

b. In the Fifth Circuit's view, SLUSA's "in connection with" requirement is properly captured by a standard previously adopted by the Ninth Circuit: "[A] misrepresentation is 'in connection with' the purchase or sale of a securities if there is a relationship in which the fraud and the stock sale coincide or are *more than tangentially related*." App. 32a (quoting *Madden v. Cowen & Co.*, 576 F.3d 957, 965-66 (9th Cir. 2009)) (Fifth Circuit's emphasis). The court believed this standard to be required in part by this Court's purported "express[] reli[ance] on 'policy considerations' in its determination of the scope of the 'in connection with' language." App. 26a (citing *Blue Chip Stamps*, 421 U.S. at 737, and *Dabit*, 547 U.S. at 81). Those "policy considerations," the court explained, require that any interpretation of the "in connection with" requirement not "[p]reclud[e] any group claim against any … debt issue merely be-

cause the issuer advertises that it owns [SLUSA-covered securities] in its portfolio." App. 29a.

c. Applying the Ninth Circuit standard to the cases at bar, the court held that none alleged misrepresentations "in connection with" transactions in covered securities, as required to implicate SLUSA. Beginning with the SEI and Willis Defendants, the court recognized that "the CDs' promotional material touted that [SIB's] portfolio of assets was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks.'" App. 11a. But the touting of "marketable securities" backing, the court explained, was "but one of a host of (mis)representations made to the Appellants in an attempt to lure them into buying the worthless CDs." App. 35a-36a. The allegations concerning SLUSA-covered securities were "merely tangentially related to the [heart] of the defendants' fraud," the court concluded, which was to represent "to the Appellants that the CDs were a 'safe and secure' investment that was preferable to other investments for many reasons." App. 36a-37a.

Further, while the court did "not quarrel with the district court's finding that some plaintiffs sold covered securities to buy the CDs," that was not sufficient to meet the "in connection with" requirement, because the "the entirety of the fraud" did not "depend[] upon the tortfeasor convincing the victims of [the] fraudulent schemes to sell their covered securities in order for the fraud to be accomplished." App. 39a.

d. The court viewed the claims against petitioner and the other Proskauer Defendants "as different" from those against the SEI and Willis Defendants, because unlike the other actions, the claims against petitioner "are solely for aiding and abetting." App. 40a. Indeed, petitioners are not alleged to have made any misrepresentations to plaintiffs at all. In the Fifth Circuit's view, the relevant "misrepresentations" for SLUSA purposes were not those involved in the underlying fraud, for which plaintiffs sought to hold petitioner responsible, but were instead the Proskauer defendants' purported statements to the SEC. Because "[t]hese alleged misrepresentations were one level removed from the misrepresentations made by SIB or the SEI and Willis Defendants," the court held that the claims against petitioners were, *a fortiori*, not covered by the SLUSA Preclusion Provision. App. 41a.

4. Petitioner and the other defendants each filed petitions for rehearing en banc, which were denied. App. 46a. This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an acknowledged, outcome-determinative conflict over the scope of the "in connection with" requirement in SLUSA's Preclusion Provision (and, by extension, its Removal Provision). The standard for determining whether that requirement has been satisfied is an important and recurring question, and this case presents an ideal vehicle for resolving it. The Fifth Circuit's decision rejects an Eleventh Circuit standard that compels preclusion here, as the district court held, and instead incorrectly construes SLUSA to permit

this state-law action even though the action unambiguously alleges a fraudulent scheme involving, and indeed dependent upon, misrepresentations about covered securities transactions.

The decision below also creates a circuit conflict concerning whether SLUSA precludes claims against alleged aiders and abettors of SLUSA-covered securities fraud who themselves have made no misrepresentations concerning covered-security transactions (as the Ninth and Eleventh Circuits have held), or whether such claims may proceed as state-law class actions, as the Fifth Circuit held below. This question, too, is important and recurring, and the Fifth Circuit answered it incorrectly. The text, structure, history, and purpose of SLUSA make clear that the statute bars any state-law class action alleging misrepresentations concerning covered-security transactions, regardless whether the defendant made those misrepresentations himself or aided and abetted the fraud of others.

This Court should grant certiorari to resolve the conflicts in the lower courts on these important questions, and should reverse the judgment below.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE SCOPE OF SLUSA'S "IN CONNECTION WITH" REQUIREMENT

A. There Is A Direct, Outcome-Determinative Circuit Conflict Over The Standard For Applying SLUSA's "In Connection With" Requirement

The first question in this case concerns the standard for determining whether an alleged mis-

representation was made "*in connection with* the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A) (emphasis added). This Court in *Dabit* held that the "in connection with" requirement must be given a "broad interpretation." 547 U.S. at 85. In particular, the requirement does *not* mean that the plaintiff himself must have purchased or sold a covered security—"it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Id.*

But *Dabit*'s holding that the misrepresentation must "coincide" with the securities transaction has only engendered further controversy as courts seek to refine, define, and apply that gloss on the "in connection with" requirement. As the Fifth Circuit recognized below, the courts of appeals have become sharply divided over the legal standard that must be applied to determine whether a misrepresentation is sufficiently connected to a covered securities transaction to satisfy the "in connection with" requirement.

1. *The Standard Adopted By The Second, Sixth, And Eleventh Circuits Finds Preclusion When The Alleged Fraud "Coincides With" Or "Depends Upon" A Transaction In Covered Securities, Which Would Compel Preclusion Here*

Consistent with *Dabit*, most courts of appeals to have considered the issue have interpreted SLUSA's "in connection with" requirement broadly, and the closely related standards they have adopted would compel preclusion here.

a. The Eleventh Circuit has held that a misrepresentation is made "in connection with" a covered

securities transaction so long as either an alleged misrepresentation about a covered securities transaction "induced [plaintiff] to invest with [defendant]," or the misrepresentation "coincided and depended upon the purchase or sale of securities." *IPM*, 546 F.3d at 1349.

In *IPM*, the plaintiffs had argued that their claim was not SLUSA-precluded because the "gravamen" of their complaint was that the defendant aided and abetted the primary perpetrator—Pension Fund of America ("PFA")—who (like the Stanford entities here) had promised to invest their funds in SLUSA-covered securities, but instead embezzled them. *Id.* at 1348-49. The court rejected that argument because (as here) the plaintiffs alleged that they were induced by the fraud to invest with PFA on the promise that their money would be invested in covered securities. *Id.* at 1349-50. It was irrelevant, the court held, that some of the misrepresentations alleged in the complaint did not involve SLUSA-covered securities at all: if "a single claim premises liability on multiple factual theories, then that claim would be precluded if at least one of those theories hinges on representations made 'in connection with the purchase or sale' of a security." *Id.* at 1350.

The Eleventh Circuit rule would compel preclusion in this case, as both courts below recognized. The district court explicitly invoked the Eleventh Circuit standard to find SLUSA preclusion, and the Fifth Circuit did not suggest in any way that the district court misapplied that standard. The court of appeals instead reversed only because it *expressly rejected* the Eleventh Circuit's holding that preclusion arises where, as here, the alleged misrepresen-

tation about a covered securities transaction induces the plaintiff's investment. App. 30a-31a; *see infra* at 22. The Fifth Circuit recognized that SIB allegedly "induced" plaintiffs to purchase CDs on the belief that the funds would be invested in SLUSA-covered securities, *IPM*, 546 F.3d at 1349, but deemed that allegation insufficient to give rise to SLUSA preclusion. App. 35a-37a. Similarly, the alleged fraud "depended upon" transactions in covered securities: Stanford's Ponzi scheme functioned only so long as investors continued to purchase CDs, relying on the false promise that SLUSA-covered securities were purchased with the CD proceeds. Indeed, Stanford Financial allegedly "told their brokers and advisors that 'liquidity/marketability of SIB's invested assets' was the '*most important factor* to provide security to SIB clients.'" SAC ¶ 41 (emphasis added).

b. The Second Circuit has articulated a standard similar to the "depends upon" prong of the Eleventh Circuit standard. In *Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010), the court noted the disparity of approaches among the courts of appeals, *id.* at 521, and explained that under its own precedent, the SLUSA requirement is met "where plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities," *id.* at 522.

That rule also would require a finding of preclusion here, because the alleged fraud "necessarily involve[s]" covered-security transactions, *Romano*, 609 F.3d at 522, for the reasons already explained: Stanford's scheme required investors to believe SIB's false statement that proceeds from CD sales would be used to purchase covered securities. Otherwise, they would not to continue to invest in the CDs and

Stanford could not continue to promise—much less deliver—high returns. Indeed, district courts in the Southern District of New York applying the Second Circuit standard have repeatedly and overwhelmingly concluded that Madoff-related cases nearly identical to this one are precluded under SLUSA. These so-called Madoff "feeder fund" cases were brought by investors in hedge funds (the "feeder funds") that had in turn invested in Madoff's fund, alleging fraud against the feeder funds. *E.g.*, *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299 (S.D.N.Y. 2010). Just as with the SIB CDs, investors in the feeder funds did not themselves purchase SLUSA-covered securities, but instead purchased an interest in the funds, which in turn invested with Madoff, who falsely claimed that he would invest in SLUSA-covered securities. *Id.* at 304. These cases almost uniformly have been held to be SLUSA-precluded under the Second Circuit's "in connection with" standard, because they rest on and necessarily allege that "Madoff told investors that he would purchase and sell securities in the Standard & Poor's 100 Index." *Id.* at 312 (quotation omitted); *see, e.g.*, *In re Herald, Primeo & Thema Sec. Litig.*, 2011 WL 5928952, at *5-*8 (S.D.N.Y. Nov. 29, 2011); *Backus v. Conn. Cmty. Bank, N.A.*, 789 F. Supp. 2d 292, 304-06 (D. Conn. 2011).[1]

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[1] *See also In re Merkin*, 817 F. Supp. 2d 346, 360-61 (S.D.N.Y. 2011); *In re Kingate Mgmt. Ltd. Litig.*, 2011 WL 1362106, at *9 (S.D.N.Y. Mar. 30, 2011); *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226, 1246-47 (D. Colo. 2011); *Wolf Living Trust v. FM Multi-Strategy Inv. Fund, LP*, 2010 WL 4457322, at *3 (S.D.N.Y. Nov. 2, 2010); *Newman*, 748 F. Supp. 2d at 313; *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 430 (S.D.N.Y. 2010); *Barron v. Igolnikov*, 2010 WL 882890, at *5

c. Similar to the Second and Eleventh Circuit standards, the Sixth Circuit has held SLUSA's "in connection with" requirement satisfied when the fraud "coincide[s] with" or "depend[s] upon" securities transactions. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009) (quotation omitted). The Sixth Circuit has further held that SLUSA "does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentations in connection with buying or selling securities." *Id.* It only "asks whether the complaint *includes* these types of allegations, pure and simple." *Id.* at 311 (emphasis added); *see IPM*, 546 F.3d at 1350.

That rule would plainly compel preclusion here. Indeed, the Fifth Circuit itself expressly recognized that the complaint satisfies that test. App. 35a ("To be sure, the CDs' promotional material touted that SIB's portfolio of assets was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks.'").

(S.D.N.Y. Mar. 10, 2010). Strangely, the Fifth Circuit relied only on the two S.D.N.Y. cases holding that SLUSA does not apply. App. 37a-38a (citing *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 750 F. Supp. 2d 450, 453 (S.D.N.Y. 2010); and *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010)). But in *Montreal Pension*, the principal fraud alleged was that of particular hedge funds, not the underlying Madoff fraud. 750 F. Supp. 2d at 455; *see In re Kingate*, 2011 WL 1362106, at *8-*9. "*Anwar* … is the sole case in which a court within the Southern District found that SLUSA did not preempt fraud claims related to a Madoff feeder fund," *id.* at *8, and has been rejected as an outlier. *See*, *e.g.*, *Backus*, 789 F. Supp. 2d at 304-06.

2. *The Fifth And Ninth Circuits' Standard Precludes A Claim When The Fraud Allegations Are "More Than Tangentially Related" To A Covered Security Transaction, Which The Fifth Circuit Applied To Reject Preclusion Here*

a. The Ninth Circuit has adopted a test that differs from the standards adopted by the Second, Sixth, and Eleventh Circuits. *See Madden v. Cowen & Co.*, 576 F.3d 957, 966 (9th Cir. 2009). Under the Ninth Circuit's rule, SLUSA preclusion turns on the court's assessment of the overall focus of the alleged fraud. Fraud occurs "in connection with" the purchase or sale of a covered security, the Ninth Circuit holds, "if there is a relationship in which the fraud and the stock sale coincide or are more than tangentially related." *Id.* at 966 (quotation omitted). If the alleged fraud is only "tangentially related" to a covered securities transaction, that is, SLUSA preclusion will not apply. *Id.*

b. In the decision below, the Fifth Circuit expressly adopted the Ninth Circuit standard in rejecting preclusion here, likewise expressly rejecting the alternative standard adopted by the Second, Sixth, and Eleventh Circuits. The Eleventh Circuit's "inducement" prong improperly views the issue from the plaintiff's perspective, the court reasoned. The "depends upon" prong—which is similar to the Second Circuit standard—is at least properly "defendant-oriented," the court explained, but the court nevertheless rejected it. App 30a-31a. And the Sixth Circuit test is too indeterminate, the court concluded, because while an action based on fraud that "depends upon" a covered securities transaction will re-

sult in SLUSA preclusion, the test permits consideration of other unspecified circumstances as well. *Id.*

In the Fifth Circuit's view, the Ninth Circuit's "tangentially related" standard "nicely deals with the … tension" between taking the "in connection with" requirement "seriously," while avoiding a construction that precludes "every common-law fraud [action] that happens to involve covered securities." App. 32a (quotation omitted). "Accordingly, if [a plaintiff's] allegations regarding the fraud are more than tangentially related to (real or purported) transactions in covered securities, then they are properly removable and also precluded." *Id.*

c. Applied here, the "tangentially related" test does not result in preclusion, the Fifth Circuit held, unlike the Eleventh Circuit "inducement" standard applied by the district court. App. 36a. The court of appeals acknowledged that "the CDs' promotional material touted that SIB's portfolio was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks,'" App. 35a—securities that, the court agreed, are covered by SLUSA. But the court considered it significant—indeed, dispositive—that the complaint also alleged various other misrepresentations not directly related to covered securities. App. 35a-37a. In light of those other alleged statements, the court held that the covered security transaction was "merely tangentially related" to the "gravamen" of the fraud, and the action therefore is not precluded. App. 36a.

B. The Scope Of The "In Connection With" Requirement Is An Important And Recurring Question

The foregoing conflict over the scope of SLUSA's "in connection with" requirement implicates a recurring question of national importance. This Court granted certiorari in *Dabit* to resolve just that question, but the answer given in *Dabit* did not provide sufficient guidance: since *Dabit*, at least five different courts of appeals have attempted to further define the requirement, and have been unable to arrive at a uniform answer. Unsurprisingly, controversy over the scope of the requirement arises with even greater frequency in the district courts.[2] That the scope of the SLUSA "in connection with" requirement necessarily arises in the class action context greatly magnifies its significance.

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[2] *See*, *e.g.*, *supra* note 1 (citing numerous S.D.N.Y. cases); *Weitman v. Tutor*, 588 F. Supp. 2d 133, 138-39 (D. Mass. 2008); *Rubery v. Radian Group, Inc.*, 2007 WL 1575211 (E.D. Pa. May 31, 2007); *Dougherty v. Cerra*, 2010 WL 276175 (S.D. W. Va. Jan. 20, 2010); *Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549, 555 (6th Cir. 2011); *Daniels v. Morgan Asset Mgmt., Inc.*, 743 F. Supp. 2d 730, 743 (W.D. Tenn. 2010); *Richek v. Bank of Am.*, 2011 WL 3421512 (N.D. Ill. Aug. 4, 2011); *Kurz v. Fid. Mgmt. & Research Co.*, 2008 WL 2397582 (S.D. Ill. June 10, 2008); *Jaspers v. Prime Vest Fin. Servs., Inc.*, 2010 WL 3463389 (D. Minn. Aug. 30, 2010); *Nickell v. Shanahan*, 2010 WL 199957 (E.D. Mo. Jan. 13, 2010); *Scala v. Citicorp Inc.*, 2011 WL 900297 (N.D. Cal. Mar. 15, 2011); *Hanson v. Morgan Stanley Smith Barney, LLC*, 762 F. Supp. 2d 1201 (C.D. Cal. 2011); *Ajjarapu v. AE Biofuels, Inc.*, 728 F. Supp. 2d 1154 (D. Colo. 2010); *Sullivan v. Holland & Knight LLP*, 2010 WL 1558553 (M.D. Fla. Mar. 31, 2010); *City of St. Petersburg v. Wachovia Bank, Nat'l Ass'n*, 2010 WL 2991431 (M.D. Fla. July 27, 2010).

The decision below gives rise to significant forum-shopping opportunities in such cases. If the decision below is permitted to stand, class action plaintiffs seeking to avoid the strictures of SLUSA and proceed with state-law claims will aim to file suit within the Fifth Circuit. For example, the complaint against Merrill Lynch in *IPM* could have been—and, now, likely would be—brought in the Fifth Circuit. *See* 28 U.S.C. § 1391(b), (c).

Indeed, the risk of forum shopping is especially acute because the Fifth Circuit's rule applies not only to the Preclusion Provision, but also the Removal Provision, and thus invites plaintiffs to seek out favorable state venues, from which removal will often not be an option without SLUSA (as in the *Roland* case here). For example, Louisiana's class-action venue rules are relatively lax, allowing suits against foreign defendants (like, for example, Merrill Lynch) who are licensed to do business within the state, and even against unlicensed corporations. La. Code Civ. Proc. Ann. art. 42(4), (5) (general venue rules); *id.* art. 593(a) ("An action brought on behalf of a class shall be brought in a parish of proper venue as to the defendant."); *see also Thomas v. Mobil Oil Corp.*, 843 So. 2d 504, 508 (La. Ct. App. 2003) (Louisiana law provides for "expansive venue options" in class actions). Given the narrow removal rule announced below, any plaintiff class that can meet these lax venue standards will have little reason to file suit anywhere else.

Accordingly, the Fifth Circuit's strict standards concerning when state-law securities-related fraud claims are precluded (and when they can be removed) could effectively become the nationwide rule

unless this Court grants review to resolve the circuit conflict.

C. The Fifth Circuit's Decision Misconstrues the "In Connection With" Requirement

The Fifth Circuit itself acknowledged the one fact that should be dispositive of the preclusion issue in this case: the complaint plainly alleges "a misrepresentation … in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). "To be sure," the court explained, "the CDs' promotional material touted that SIB's portfolio was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks,'" App. 35a—i.e., SLUSA-covered securities. And, the court could have added, Stanford Financial told their brokers and advisors that "'liquidity/marketability of SIB's invested assets' was the 'most important factor to provide security to SIB clients.'" SAC ¶ 41. Stanford Financial, in short, made a false promise to purchase covered securities, for the specific purpose of inducing plaintiffs' continued investments and thereby facilitating the entire fraudulent scheme. As the district court recognized, it is difficult to see how those allegations do not involve "a misrepresentation" made directly "in connection with" transactions in SLUSA-covered securities.

Even the Fifth Circuit did not disagree that plaintiffs alleged misrepresentations made in connection with SLUSA-covered securities transactions. The Fifth Circuit held, however, that those misrepresentations were simply irrelevant to the analysis, because the alleged fraud *also* included *other* mis-

representations not directly related to covered securities. App. 35a-37a. That holding flies in the face of the statutory language, which deems state-law class actions precluded so long as the complaint "alleges … *a* misrepresentation … in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added). Indeed, the Fifth Circuit has it exactly backwards—under the statute's plain terms, all that is required is *a* misrepresentation involving SLUSA-covered securities; it is irrelevant whether the complaint *also* alleges other misrepresentations that would themselves not be covered under SLUSA.

The court of appeals made no effort to reconcile its holding with the statutory language. The court instead asserted that a narrow construction is required by this Court's purported "express reliance on 'policy considerations' in its determination of the scope of the 'in connection with' language in Section 10(b), *Blue Chip Stamps*, 421 U.S. at 737, and SLUSA, *Dabit*, 547 U.S. at 81." App. 26a. That analysis badly misreads this Court's precedent. In fact, *Dabit* specifically explains that *Blue Chip Stamps* relied on "policy considerations" to "define the scope of a private right of action under [§ 10(b)]—*not* to define the words 'in connection with the purchase or sale.'" *Dabit*, 547 U.S. at 84 (emphasis added). Rather than construe the "in connection with" requirement narrowly in light of policy considerations, *Dabit* does the opposite. It reads the statutory language as it was written, and emphasizes that "when this Court *has* sought to give meaning

to the ['in connection with' language], it has espoused a broad interpretation." *Id.* at 85.[3]

The Fifth Circuit's approach would also undermine the central purpose of SLUSA, which is to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the" PSLRA, and thus to establish "national standards for securities class action lawsuits involving nationally traded securities." SLUSA § 2(5). There is no question that this lawsuit, if brought under § 10(b), would be subject to the class-action and pleading requirements of the PSLRA, and to this Court's decisions in *Central Bank* and *Stoneridge*. The whole purpose of SLUSA, as this Court

[3] The Fifth Circuit's evaluation of "policy considerations" was in any event incorrect. One such consideration was this Court's observation in *SEC v. Zanford*, 535 U.S. 813 (2002), that the "in connection with" requirement "'must not be construed so broadly as to [encompass] every common-law fraud that happens to involve [covered] securities.'" App. 32a (quoting *Zanford*, 535 U.S. at 820) (alterations in original). That observation has no bearing here—this case is not one about fraud that just "happens to involve" covered securities. As explained, the fraud allegations depend directly on misrepresentations about covered securities transactions.

Another "policy consideration" cited by the Fifth Circuit was the supposed recognition in a Senate Report of "the importance of maintaining the vital role of state law in regulating non-national securities." App. 28a. But the "state law" mentioned in the Report was "the appropriate enforcement powers for *state regulators*, and the right of *individuals* to bring suit," neither of which SLUSA addresses at all. S. Rep. 105-182, at 8 (1998) (emphasis added). This case obviously does not involve action by "state regulators" or by "individuals." It is instead a state-law *class action*—precisely the type of action to which SLUSA is directed. *See* SLUSA § 2; S. Rep. 105-182, at 8.

made clear in *Dabit*, is to assure that those strictures apply in the class action context, and cannot be evaded by filing in state court or under state law. Yet in the Fifth Circuit, all a plaintiff class that alleges misrepresentations concerning nationally traded securities must do to "frustrate the objectives of the" PSLRA, and to avoid the "national standards" SLUSA sought to enforce, is lard its complaint with *additional* allegations of fraud unrelated to nationally traded securities. Nothing in the SLUSA's text or purpose, or in this Court's precedents, requires—or permits—that result.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE QUESTION WHETHER SLUSA PRECLUDES CLAIMS AGAINST ALLEGED AIDERS AND ABETTORS OF SLUSA-COVERED SECURITIES FRAUD

A. The Decision Below Creates A Circuit Conflict Over Whether SLUSA Preclusion Applies To Aiding And Abetting Claims

The Fifth Circuit held that respondents' state-law claims may proceed against all defendants, despite SLUSA, for the reasons explained above, but also held that respondents' claims against petitioner may proceed for an additional reason. Plaintiffs' "claims against [petitioner] are solely for aiding and abetting the Stanford Ponzi scheme," the court noted, and petitioner did not make any misrepresentations to plaintiffs at all (and in any event made no misrepresentations to anyone concerning covered securities). App. 40a. In those circumstances, the court of appeals held, SLUSA preclusion does not apply *even if*

the underlying fraud is SLUSA-covered, because the defendant's own statements are not "in connection with" a securities transaction. App. 40a-41a. That holding squarely conflicts with decisions of the Ninth and Eleventh Circuits.

In the Eleventh Circuit's *IPM* decision discussed above, the defendant (Merrill Lynch) was alleged to have aided and abetted fraudulent misrepresentations by PFA, which plaintiffs claimed had embezzled their money instead of investing it. *E.g.*, 546 F.3d at 1342, 1346. Merrill Lynch was not itself alleged to have made any fraudulent misrepresentations concerning securities transactions. Nevertheless, the Eleventh Circuit held that the claim was SLUSA-precluded—it was based on "allegations that Merrill Lynch is liable for IPM's losses because it aided and abetted PFA's fraudulent misrepresentations," which were themselves in connection with the purchase or sale of a covered security. *Id.* at 1351. If respondents' case against petitioner had been brought in the Eleventh Circuit, it would have been precluded.

The Ninth Circuit follows the same approach. In *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009), plaintiffs alleged fraud against Ernst & Young, and also alleged that Vishay aided and abetted that fraud. After holding that Ernst & Young's misrepresentations were made in connection with the purchase or sale of a covered security, the court further held that "although [the claim] against Vishay does not state that Vishay itself made misrepresentations or omissions, the plaintiffs' pleadings implicate Vishay as responsible for Ernst &

Young's acts and so warrant dismissal of this claim against all defendants." *Id.* at 1223.

B. Whether SLUSA Precludes Aiding And Abetting Claims Is A Recurring And Important Question

The decision below obviously cannot be reconciled with the foregoing Ninth and Eleventh Circuit precedents. It is especially important for the Court to resolve the conflict, because the question presented arises in the class-action context, where forum shopping opportunities—including in state courts with lax venue rules—are prevalent. Aiding-and-abetting and similar claims against defendants who have not themselves made misrepresentations concerning securities are not privately actionable under federal securities law. *See Cent. Bank,* 511 U.S. at 191; *Stoneridge*, 552 U.S. at 152-53. Thus, if such claims are available at all, it is only under state law. In the Ninth and Eleventh Circuits, however, when such claims concern national securities, they are limited to individual actions, consistent with SLUSA's central purpose. *See supra* at 4-5. If the Fifth Circuit's decision is allowed to stand, it will create a de facto nationwide rule, and that court (and state courts within the Fifth Circuit) will instantly become a magnet for state-law class actions alleging secondary liability, providing an easy end-run around not only the PSLRA and SLUSA, but also this Court's decisions in *Central Bank* and *Stoneridge*. Such a "vast expansion" (*Cent. Bank*, 511 U.S. at 183) of securities fraud class actions should not be allowed without this Court's review and approval.

C. The Decision Below Is Incorrect

The Fifth Circuit's decision contradicts the statute's plain text. Again, SLUSA precludes state-law class actions "alleging *a* misrepresentation … in connection with" a covered-security transaction. 15 U.S.C. § 78bb(f)(1)(A) (emphasis added). The provision by its terms precludes all state-law class actions alleging *anyone's* misrepresentation in connection with a covered-security transaction, not just the defendant's.

That conclusion is confirmed by the statute's structure. The very next SLUSA provision precludes actions alleging "that *the defendant* used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." *Id.* § 78bb(f)(1)(B). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). The lack of any limitation of the "misrepresentation" provision to the defendant's conduct, contrasted with existence of such a limitation in the "manipulative or deceptive device" provision, demonstrates that SLUSA precludes all state-law class actions alleging misrepresentations concerning covered securities, regardless whether the misrepresentation was made by the defendant.

The Fifth Circuit's decision also contradicts SLUSA's history and purpose. To begin, just as in *Dabit*, interpreting SLUSA as relating only to the

defendant's alleged misrepresentations—and thus, in effect, excluding aiding-and-abetting actions from its scope—"would give rise to wasteful, duplicative litigation." 547 U.S. at 86. "Facts supporting an action [against primary violators] under [§ 10(b)] (which must proceed in federal court if at all) typically support an action by [aiders-and-abettors] as well." *Id.* Accordingly, the "prospect is raised … of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts." *Id.* "That prospect … squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Id.* at 86-87 (quoting SLUSA § 2(5)).

Further, the Fifth Circuit's decision will lead to absurd results. It will preclude state-law class claims against defendants directly involved in SLUSA-covered securities fraud, but allow such class actions against remote actors. That result is completely backwards, and utterly without basis in the scheme Congress established.

This aspect of the Fifth Circuit's decision most obviously undermines SLUSA's purpose of obtaining "national standards for securities class action lawsuits involving nationally traded securities," SLUSA § 2(5), because the "national standards" in this context allow suits solely against primary violators (i.e., those who themselves make misrepresentations), not secondary actors. *See Cent. Bank,* 511 U.S. at 191; *Stoneridge*, 552 U.S. at 152-53. Thus, if allowed to stand, the Fifth Circuit's decision would lead to a proliferation of state-law securities-fraud class actions of the sort expressly precluded by federal law.

Indeed, that was the precise motivation for filing this suit under state law. The claims here were brought under state law as part of a "strategy" to "get around the U.S. Supreme Court's rulings in [*Central Bank*] and [*Stoneridge*], which have been the death knell to federal securities law claims against third party advisors to accused fraudsters." Julie Triedman, *Fifth Circuit Green-Lights $7 Billion Claims Against Proskauer, Other Stanford Advisors*, AmLaw Daily (Mar. 20, 2012). That is precisely the result SLUSA was enacted to prevent. SLUSA § 2. This Court should grant certiorari to ensure that SLUSA fulfills its central objective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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