No. 12-79

IN THE

Supreme Court of the United States

CHADBOURNE & PARKE LLP,
Petitioner,

v.

SAMUEL TROICE, ET AL.,
Respondents.

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

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ARGUMENT

There is no ambiguity about what plaintiffs' complaint alleges: The Stanford entities sought to induce investment in certificates of deposit ("CDs") issued by Stanford International Bank ("SIB") by representing that the SIB CDs (i) were "safer even than U.S. bank-issued CDs" because the CDs "were liquid" and "could be redeemed at any time," and (ii) offered "high return rates … that greatly exceeded those offered by commercial banks in the United States." J.A. 433 (SAC ¶ 24); 449 (SAC ¶ 49). This liquidity and above-market return was possible because SIB invested the proceeds of CD sales only in "safe, secure, and liquid assets," i.e., "highly marketable securities" and a "diversified portfolio" that included "stocks" and "bonds" and appeared and functioned "much like a mutual fund." J.A. 433 (SAC ¶ 24), 444 (SAC ¶ 41), 458 (SAC ¶ 65).

Those allegations assert "a misrepresentation … of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The alleged misrepresentation is plain: SIB promised to invest the proceeds of CD sales in a safe and high-performing portfolio of marketable securities, when SIB in fact did no such thing. Materiality is equally plain: the promised investment in high-performing marketable securities rendered plausible SIB's claim that the CDs would feature liquidity and high returns. And plainest of all is the connection to transactions in covered securities: SIB's false promise to use the proceeds of the CDs' sale to purchase

safe and marketable securities is what established both the misrepresentation and its materiality.

Plaintiffs' principal response is a non sequitur. They contend that because the *CDs themselves* were not covered securities, SIB made no misrepresentation in connection with transactions in covered securities. *E.g.*, Resp. Br. 1, 10, 15, 18. Plaintiffs miss the point: the misrepresentation alleged was the false promise that SIB would take "the money it received from the sale of CDs and … invest[] in" a diversified portfolio of covered securities. J.A. 458 (SAC ¶ 65). Because *that* alleged misrepresentation directly concerned covered-securities transactions and was decidedly material to the fraud, the complaint is precluded by the Securities Litigation Uniform Standards Act ("SLUSA"). For the reasons elaborated below, plaintiffs fail to show otherwise.

I. PLAINTIFFS' ARGUMENTS ABOUT MISREPRESENTATION OF SIB'S "OWNERSHIP" OF COVERED SECURITIES ARE IRRELEVANT

Plaintiffs' first argument is that a "false claim to *own* covered securities is not made 'in connection with' the '*purchase or sale of*' those assets." Resp. Br. 22. That argument bears no relevance to the *Troice* complaint against Chadbourne, which alleges *more* than just SIB's false claim to "own" covered securities. As plaintiffs eventually concede (Resp. Br. 29-30), the *Troice* complaint alleges that SIB falsely represented that "SIB took the money it received from the sale of CDs and … invested in an allegedly diversified portfolio that included [covered securi-

ties], much like a mutual fund." J.A. 458 (SAC ¶ 65).[1] SIB's promises to purchase covered securities were the sole grounds for plaintiffs' belief that the CDs would offer the liquidity and high returns of "well-performing equities." Pet. App. 11a.

There is thus no basis for plaintiffs' ominous warning that if SLUSA applies here, "every false statement about securities ownership—whether in a credit application, a job interview, or anywhere else—potentially constitutes securities fraud." Resp. Br. 11; *see* Resp. Br. 27-28 (describing, *inter alia*, divorcing spouses who conceal assets and suitors who exaggerate their investment wealth). Whatever might be said about misrepresentations concerning *ownership* of covered securities, a misrepresentation concerning a *purchase* of covered securities is undoubtedly a misrepresentation made in connection with a purchase of covered securities.

II. FALSE PROMISES TO PURCHASE COVERED SECURITIES ARE MISREPRESENTATIONS "IN CONNECTION WITH" THE PURCHASE OF COVERED SECURITIES

Plaintiffs nevertheless gamely insist that false promises to purchase covered securities are not "in

[1] Plaintiffs suggest in passing that this alleged diversified portfolio of securities may not refer to "covered securities" under SLUSA (Resp. Br. 21-22), but they never raised that argument below or in their opposition to certiorari. And both courts below read the complaint as alleging promised investments in covered securities. Pet. App. 35a-38a, 64a-65; *see also* U.S. Br. 18 ("securities having [the] characteristics" described in the complaint "'typically qualify as SLUSA-covered securities'" (quoting Pet. App. 72a)).

connection with" the purchase of covered securities. The Securities Exchange Commission ("SEC")—which enforces a law with the same language, meaning, and purpose—disagrees. *See* U.S. Br. 18. Plaintiffs bizarrely describe the SEC's submission as a "significant change" in the agency's position (Resp. Br. 57), yet they cite not a single earlier ruling, opinion, or statement by the SEC remotely suggesting a different view.[2] The SEC's judgment that SIB's alleged misrepresentations "were directly linked to the purchase or sale of covered securities" (U.S. Br. 18) is fully entitled to the deference accorded such considered, expert agency judgments. Pet. Br. 30 n.4.

The SEC's conclusion, however, is not only a product of the agency's experience and expertise in enforcing the statute. It also follows directly from the language and purpose of the statute itself.

A. SLUSA's Plain Language—Rather Than Inapposite Hypotheticals—Controls The Statute's Meaning

As already discussed, it is impossible to see how, purely as a linguistic matter, a false promise to purchase covered securities does not constitute a false statement made "in connection with" the purchase of covered securities. Indeed, plaintiffs themselves concede that SLUSA's plain text encompasses the *Troice* allegations, albeit in what they call a "hyper-

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[2] Plaintiffs also suggest that the case is governed by the deference rule of *Auer v. Robbins*, 519 U.S. 452 (1997), which they then ask the Court to overrule. But "*Auer* deference" involves an agency's interpretation *of its own regulation*, which has nothing to do with this case.

literal" reading of that text. Resp. Br. 36. But "hyper-literal" is just a sophist's way of trying to make "strictly accurate" sound bad. In fact, the literal reading of a statute's text is the reading that controls unless "the words 'could not conceivably have been intended to apply' to the case at hand." *Logan v. United States*, 552 U.S. 23, 36 (2007) (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 511 (1989)).

To make that case, plaintiffs offer a parade of horribles to illustrate what would befall the world if the Court simply accepted SLUSA's text for what it says. But their horribles are not so horrible.

The securities laws would not apply, for example, to a person who "falsely promised to sell an existing (or non-existent) stock portfolio to resolve any obligation" (Resp. Br. 31-32), because there is no *fraud* in that scenario—there is simply an unfulfilled promise and an unfulfilled obligation. Nor would the securities laws "apply if two people enter into a business partnership, in which one promises to finance the venture, misrepresenting his securities holdings in the process to secure more favorable partnership terms." Resp. Br. 32. In that hypothetical, there is no misrepresentation concerning the *purchase or sale* of securities. On the other hand, the securities laws might well apply (though the Court need not decide) when a "borrower (or purchaser on credit) … promised to purchase stocks that could be liquidated to pay the debt." Resp. Br. 31. That hypothetical essentially describes the equivalent of a margin account—a bank lends an investor money to purchase stock conditioned on the investor's promise to actual-

ly purchase the stock, and thus prices the lending terms accordingly, to account for the riskiness of the collateral (i.e., stock). If the investor were instead to, say, purchase illiquid assets like artwork or real estate rather than stock, the inducement of the loan through the false promise to purchase stock might indeed constitute securities fraud. After all, if the securities markets could be deployed as a tool to lure investment in fraudulent schemes of any variety, it would become more difficult to attract legitimate investments in the securities markets. *See infra* at 19-20.

Plaintiffs also contend that following SLUSA's literal language would result in an "end-run" around *Marine Bank v. Weaver*, 455 U.S. 551 (1982), which holds that an FDIC-insured CD is not a "security" under the securities laws. Resp. Br. 32. Plaintiffs say that if SLUSA's literal language controls, then whenever an FDIC-insured CD is marketed or individually negotiated through misrepresentations about securities transactions, those misrepresentations might be deemed securities fraud. Resp. Br. 32. And indeed they might. But what would matter in that scenario is the *misrepresentation about securities transactions*, not the fact that the misrepresentation induced the investment in an FDIC-insured CD. The same rule would apply to marketing deposits in a bank account or purchases of real-property investment or any other non-security investment vehicle: the securities laws would be implicated *only* in some unusual situation (like that alleged here) where the marketing involved material misrepresentations about securities transactions. Applying

SLUSA's plain language thus would not result in an end-run around the rules that make any non-security a non-security. It would simply result in application of the securities laws to situations that actually involve fraud in connection with the purchase or sale of securities.

Under this Court's precedents, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else," *SEC v. Zandford*, 535 U.S. 813, 820 (2002), or that a complaint simply allege "deceptive practices touching" a securities transaction, *Superintendent of Ins. of the State of N.Y. v. Bankers Life and Cas. Co.*, 404 U.S. 6, 12-13 (1971). And "coincide" and "touching" are not exclusive formulations—all that is required is "deception 'in connection with the purchase or sale of [a covered] security.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006). That language does not require that the fraud victim be a party to any securities transaction. *See Dabit*, 547 U.S. at 85. Nor does it require that any party to a securities transaction be deceived. *United States v. O'Hagan*, 521 U.S. 642, 648 (1997). And the relevant misrepresentation need not have anything to do with the value of any security. *Zandford*, 535 U.S. at 820.

This case falls easily within the broad boundaries of the statute demarcated by those precedents. The alleged misrepresentations here do more than simply "touch" or "coincide" with purported covered-securities transactions—the entire Ponzi scheme depended upon the tight connection between the misrepresentations and the phantom transactions. A

principal way in which SIB induced petitioners to purchase CDs was through the (false) promise that the proceeds of the CD sales would be invested in covered securities. Pet. Br. 32-33. The proceeds, however, were actually used to "cover interest payments and redemptions," as well for "personal luxuries and unprofitable investments." Resp. Br. 4. In other words, misrepresentations concerning investments in covered securities were employed to bring in new CD purchases, the proceeds of which were not in fact used to purchase covered securities, but were used to pay off earlier victims and thereby cover up the ongoing fraudulent scheme. Those allegations more than suffice to bring this fraud well within the "in connection with" requirement as this Court has interpreted it. Pet. Br. 31-33; *see infra* at 10-12.

B. There Is No Merit To Plaintiffs' Nontextual Theory That The Fraud Victim Must Acquire An Interest In The Covered Security

Plaintiffs' inability to demonstrate that the statute's plain meaning is unworkable or unreasonable should end the inquiry: the plain meaning controls. *See supra* at 4-5. The Court thus need not consider plaintiffs' proposed alternative interpretation of the statute. The glaring flaws in that interpretation, however, do underscore the simplicity and clarity—and correctness—of the statute's "literal" meaning discussed above.

Under plaintiffs' interpretation of SLUSA (and § 10(b)), a false promise to purchase securities is not "in connection with" a purchase of securities if "the

defrauded party … acquired no interest in the covered securities." Resp. Br. 16; *see* Resp. Br. 12, 30, 52. In other words, a misrepresentation "coincides" with a securities transaction only when the victim of the fraud engaged in the regulated transaction. Where, as here, it was the perpetrator who engaged in the covered-securities transaction, and the fraud victims purchased only non-covered securities, there can be no securities fraud, say plaintiffs.

1. To start, plaintiffs' interpretation is completely nontextual. SLUSA applies to any complaint alleging a misrepresentation "in connection with the purchase or sale of *a* covered security"—not, as plaintiffs would have it, "the purchase or sale of *the fraud victim's* covered security."

This Court has expressly rejected prior attempts to impose artificial limitations on the "in connection with" requirement. In *Zandford*, the alleged fraud had no bearing on the value of any security. 535 U.S. at 820-21. In *O'Hagan*, the fraud victims had nothing to do with *any* securities transaction. 521 U.S. at 658. And in *Dabit*, the Court held that securities fraud does not require proof that "plaintiff himself was defrauded into purchasing or selling particular securities." 547 U.S. at 85. Likewise here, plaintiffs were not promised that *they* would receive ownership of any covered security. But they *were* promised that *SIB* would purchase and own covered securities, which in turn would directly and significantly benefit plaintiffs' investments in non-covered securities. The false statement was thus directly connected to purchases of "*a* covered security," just as the statute's text requires.

2. Plaintiffs contend that the term "coincide"—which this Court has used in construing the "in connection with" requirement—supports their view that the alleged misrepresentation must concern the fraud victim's own transaction. Resp. Br. 34. According to plaintiffs, when the victim is induced into a non-covered-security transaction by a false promise concerning a *later* covered-security transaction, the two transactions are "distinct" and thus do not "coincide." Resp. Br. 35.

The "coincide" standard articulated by this Court was a way of making clear that the "in connection with" requirement should receive a "broad construction," *Dabit*, 547 U.S. at 86—not to narrow the natural reading of the statutory language, as plaintiffs would have it. And at least in the circumstances presented here, the misrepresentations and purported transactions "coincide" by any understanding of that term. As explained above, the fraud here was an ongoing Ponzi scheme that depended upon the integral, ongoing relationship between promised securities transactions and new CD purchases: the misrepresentations about covered-securities transactions lured new CD purchases, which provided the cash needed to pay off earlier CD purchases. And because that cash was *not* used to purchase covered securities as promised to support the CDs, continued misrepresentations about covered-securities transactions were required to obtain new cash to pay off the later CD purchases, and so on. The alleged fraud thus was not "complete" upon the sale of any particular CD, as plaintiffs assert (Resp. Br. 34), but re-

mained ongoing, each transaction facilitating the next, in a single ongoing cycle of fraud.

This Court has in any event never required a temporal link of the kind plaintiffs demand. For example, the fraudulent misrepresentation in *Bankers Life*—a false promise that the victim of the fraud would receive the proceeds of a securities sale, 404 U.S. at 7-9—did not occur at the same time as the sale, but it was securities fraud nonetheless, *id.* at 12-13; *see also Zandford*, 535 U.S. at 821-22. The only reason plaintiffs can say that "SIB's misstatements did not coincide with … the 'purchase or sale of a covered security' by *any* person" (Resp. Br. 39) is that the later transactions *never actually happened*. But nobody here contends that a false promise to purchase securities is not securities fraud merely because the transaction did not occur as promised. Indeed, if the alleged fraud were exactly the same except that SIB had promised to purchase, say, safe covered securities (like large-cap stocks) but instead purchased risky ones (like market-traded derivatives) (Pet. Br. 31), no one would say the ongoing fraud did not coincide with a covered-securities transaction, even though the fraud victims would have had no ownership interest in any covered security.

Plaintiffs contend that it "is not enough that the fraud and the later purchase of covered securities could be characterized as part of a common scheme." Resp. Br. 35. But the question is merely whether the misrepresentation and the covered-securities transaction "coincide," *Zandford*, 535 U.S. at 822, as they plainly do here for the reasons just discussed.

Plaintiffs say that *O'Hagan* holds otherwise, but it does not. The passage cited by plaintiffs (Resp. Br. 35) explains that a scheme in which "a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities" would not satisfy the "in connection with" requirement because "the fraud would be complete as soon as the money was obtained." 521 U.S. at 656. But unlike a fraud that induces the victim to hand over money through a non-securities-related fraud that then results *independently* in the purchase of securities, this fraud induced plaintiffs to invest based on misrepresentations that the proceeds would be invested in covered securities, and those proceeds were used to pay off prior victims rather than to purchase covered securities. The fraud did not end when any given CD was sold.

3. Finally, plaintiffs contend that SLUSA's materiality element implicitly requires that an alleged misrepresentation concern the victim's purchase of covered securities, rather than the perpetrator's purchase. The securities laws, plaintiffs say, "ask whether the misstatement was 'material' to the purchase or sale of *the regulated security*." Resp. Br. 38 (emphasis added). And thus under SLUSA, they conclude, "the misrepresentation must be material to the transaction in the *covered* security." *Id.*

Plaintiffs' assertion that materiality must relate to the purchase or sale of "the regulated security" is utterly baseless. A misstatement certainly must be material *to the fraud*, thereby weeding out cases involving "essentially useless information." *Basic Inc.*

v. Levinson, 485 U.S. 224, 231-32, 234 (1988). And most traditional securities frauds do involve material falsehoods affecting the value of a security that the victim herself had bought or sold. But neither the securities laws, nor this Court's precedents construing those laws, limit the reach of the statute to false statements material to the victim's purchase of the regulated security. Just the opposite: this Court has expressly held that securities fraud need *not* involve a purchase or sale of a regulated security by the victim of the fraud, or misinformation concerning the value of a regulated security. *See supra* at 7.

The clearest example is *Zandford*, which would have come out the other way under plaintiffs' theory. There, a stock broker with whom investors had opened a discretionary account sold securities from the account without the investors' knowledge or permission and used the proceeds for his own benefit. 535 U.S. at 820-21. The material omission was that Zandford was selling the securities without his clients' permission and keeping the money. *Id.* at 822-23. That information had no bearing on any security's value, *id.* at 820-21, or on anyone's decision whether to buy or sell any security. The omission was material only to the investors' decision whether to allow Zandford to invest their money in the first place. *See id.* at 822-23.

So too here. SIB's covered-securities-related misstatements were material to plaintiffs' decision to purchase SIB CDs, which suffices to satisfy SLUSA's materiality requirement.

C. Other SLUSA Provisions Do Not Undermine The Plain Meaning Of The "In Connection With" Requirement

Plaintiffs next argue that the literal meaning of "in connection with" cannot control because it would contravene other "textual features of SLUSA." Resp. Br. 52. Plaintiffs are incorrect.

1. Plaintiffs first say that SLUSA's limitation to "covered" securities means that if Congress had wanted to preclude suits "like this one that involve fraud in the sale of non-covered assets," Congress would have said so. *Id.* As shown above, however, this case involves fraud in connection with the purchase of *covered* securities, and thus fits comfortably within the statute's design.

2. Plaintiffs contend that by limiting SLUSA to the "purchase or sale" of covered securities, Congress did not target "suits alleging frauds that have no effect on the *market* for covered securities." Resp. Br. 52. If plaintiffs mean that SLUSA-covered fraud must implicate the concern of the securities laws with the integrity of the market for (covered) securities generally, that concern is implicated here, as described below. *See infra* at 19-20. Plaintiffs' contention that Congress would not have made SLUSA apply to any case involving "'a' single allegation of a covered misrepresentation" if it meant to include frauds with no effect on the covered-securities market (Resp. Br. 52-53) is wrong for the same reason.

3. Plaintiffs next contend that SLUSA's reference to suits "alleging" misrepresentations establishes that a *defendant's* false promise to purchase and own

covered securities cannot be a false statement "in connection with" the purchase of covered securities. According to plaintiffs, a case such as this one involving the defendant's alleged misrepresentations concerning their own covered-securities transactions can easily proceed without reference to those misrepresentations, and would thus turn SLUSA preclusion into a pleading game. Resp. Br. 53-54. Plaintiffs are wrong as to SLUSA preclusion generally, and as to this fraud in particular.

To begin, plaintiffs err in contending that fraud victims generally can "avoid SLUSA preclusion merely by omitting any allegation of a misstatement relating to covered securities." Resp. Br. 54. As a general matter, courts hold that because SLUSA provides for removal and federal jurisdiction, plaintiffs cannot avoid its reach through "artful pleading," and courts are thus "free to look beyond the face of the … complaints to determine whether they allege securities fraud in connection with the purchase or sale of covered securities." *Romano v. Kazacos*, 609 F.3d 512, 519 (2d Cir. 2010); *see also Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 298 (3d Cir. 2005); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009). Moreover, even without this prohibition against "artful pleading," any fraud where the misrepresentations are not purely oral could not escape SLUSA simply by omitting relevant allegations, since courts evaluating pleadings look not only to the complaint but also to "documents incorporated into the complaint by reference." *Tellabs,*

Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).[3]

Moreover, it would fundamentally alter the nature of some frauds to exclude securities-related allegations. This fraud is one of them. Plaintiffs were told that that the CDs were safe, liquid, and yielded above-market returns because they were regulated, insured, *and the proceeds from their sale were to be invested in a diversified portfolio of covered securities*. Plaintiffs perhaps could have believed the CDs were safe based solely on the lies about insurance and regulation. But "only the assertions about covered securities would have answered investors' questions about *how* SIB could deliver the promised high returns [and liquidity] on the CDs—questions that any reasonable investor would have asked before buying a financial instrument from a foreign bank." U.S. Br. 31. Plaintiffs' complaint (and Stanford's fraud) would have made no sense without the crucial, SLUSA-covered allegations.[4]

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[3] For these reasons, there is no merit to plaintiffs' suggestion that if this Court reverses the judgment below, they should be allowed leave to file an amended pleading that erases any mention of covered-securities-related misrepresentations, which were in fact part of the Stanford fraud. Resp. Br. 59.

[4] Plaintiffs also err in contending that in cases where the fraud victim herself has made the purchase, plaintiffs bringing state-law claims "*must* allege … misrepresentations" relating to covered securities because complaints that do not allege such misrepresentations will necessarily fail to establish a state-law fraud claim. Resp. Br. 53-54. In fact, any given securities-fraud case can be simply pleaded as *fraud*. Plaintiffs cite *Zandford* as an example of a case in which, absent "allegations of securities-related misrepresentations, there would have been

D. It Would Not Be A Novel Result To Treat SIB's False Promises To Purchase Covered Securities As Connected With Covered-Security Purchases

Departing from SLUSA's text, plaintiffs contend that it would be impermissibly novel to treat as securities fraud cases based on a promise to purchase covered securities, but where the plaintiff was not the intended owner of the securities. This Court has never suggested that novelty itself is a persuasive reason to ignore the plain text of the securities laws. To the contrary, the Court has emphasized that those laws were designed to reach "*all* fraudulent schemes in connection with the purchase or sale of securities," including schemes that "present a unique form of deception." *Bankers Life*, 404 U.S. at 10 n.7 (quotation omitted).

In any event, there is no novelty here. As discussed, this Court has repeatedly held the "in con-

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no [fraud] case[] to pursue." Resp. Br. 53. But *Zandford* actually proves plaintiffs' error. Before the SEC's enforcement action against Zandford, he was prosecuted and convicted not of securities fraud, but of *wire* fraud. *Zandford*, 535 U.S. at 815. In the later SEC enforcement action, the SEC argued that the wire-fraud conviction estopped Zandford from contesting § 10(b) liability. The Fourth Circuit rejected that argument, because his wire-fraud conviction "did not necessarily establish that his fraud was 'in connection with' the sale of a security." *Id.* at 817. This Court agreed, citing the appellate court's "summary of the evidence," which described ordinary fraud with no mention of securities purchases. *Id.* at 817 n.2. *Zandford* thus refutes, rather than supports, plaintiffs' contention that a person who is the victim of covered-securities fraud has no choice but to allege the purchase or sale of covered securities in order to recover for that fraud under state law.

nection with" requirement satisfied even where the fraud victim was not the party to any securities transaction, and even when the deception had nothing to do with the value of any security. Indeed, the Madoff "feeder fund" cases, which plaintiffs say are distinguishable, are in fact identical in every respect plaintiffs say matters. Plaintiffs characterize those cases as ones in which "the defrauded party … holds some interest in the defendant's supposed portfolio of covered securities." Resp. Br. 16. Not so. As here, the "limited partnership interests sold by the Feeder Funds to investors … did not confer an ownership interest in money that the Feeder Funds ultimately invested in" covered securities—i.e., Madoff's (non-existent) portfolio. *In re Bernard L. Madoff Inv. Sec. LLC*, 708 F.3d 422, 427 (2d Cir. 2013). Since plaintiffs deem a direct ownership interest in covered securities dispositive, the Madoff cases are indistinguishable.

Moreover, there is no relevant distinction between a fraud in which the defendant promises to purchase covered securities in which the victims are promised an ownership interest—which plaintiffs agree would be precluded—and the fraud alleged here. Plaintiffs assert that this case is one "in which the defendant falsely promised to purchase the securities for *itself*." Resp. Br. 32. That description mischaracterizes the nature of the fraud. SIB promised to buy covered securities for itself so that it could offer *plaintiffs* liquidity and an above-market return. SIB could make that offer only because of its supposedly high-performing portfolio of covered securities. Pet. App. 11a-12a. Indeed, plaintiffs expressly al-

leged that they "*purchased participation interests* in Stanford Financial and SIB's investment portfolio, just like any mutual fund or hedge fund." J.A. 442-43 (SAC ¶ 39) (emphasis added). And just as would have happened if plaintiffs had been offered a direct ownership stake in SIB's portfolio, plaintiffs lost all their money because the actual assets in that portfolio turned out to be worthless.

E. Applying SLUSA To Plaintiffs' Complaint Is Fully Consistent With The Securities Laws' Purposes

1. Plaintiffs assert that SIB's alleged fraud "does not implicate public confidence in or the integrity of the market for covered securities." Resp. Br. 34; *see also* Resp. Br. 26, 42. In fact, the alleged fraud implicates those purposes directly.

As a general matter, the securities laws' purpose is "to insure honest securities markets and thereby promote investor confidence." *O'Hagan*, 521 U.S. at 658. There is no doubt that confidence in the securities markets is undermined when those markets are used as tools in schemes to defraud financial investors, even where the victims were being induced to invest in some non-security product. Potential investors have no reason to distinguish between statements about securities transactions made to induce investment in securities markets, and statements about securities transactions made to induce investment elsewhere. False statements in either context necessarily have the same effect: potential investors do not know what to believe about securities transactions, which makes them less likely to

make legitimate investments in securities markets. In other words, false statements about securities transactions in any investment context undermine confidence in securities transactions, which is why the securities laws encompass all such statements.

The effect on honest securities markets and investor confidence is particularly acute here. SIB's assurance that CD proceeds would be used to purchase covered securities "were doubtless intended to convince the respondents that investments in the CDs were as secure and liquid as investments in securities publicly traded on U.S. exchanges," U.S. Br. 18—they were supposed to have the liquidity and high returns of "well-performing equities," Pet. App. 11a. The fraud was by design meant to induce investors seeking equity-like liquidity and returns to instead invest in the supposedly safer CDs. Plaintiffs are thus wrong when they say that the alleged fraud would not "make it any less likely that any party would buy or sell securities on a U.S. national exchange." Resp. Br. 26. Frauds that promise investors equity-like returns are sure to result in victims that would have otherwise invested directly in equities to invest with the fraudster instead.[5]

[5] To be sure, this fraud had no *direct* effect on any given securities transaction, which is why the government's cert-stage assertion that the alleged "fraud had *no prospect* of affecting the market in such securities," Resp. Br. 38 (quoting U.S. Cert. Br. 12) (emphasis in original), is not inaccurate. But that is so only because SIB *did not purchase* the covered securities it promised to purchase, a fact on which plaintiffs wisely place no significance. The fraud *would* have had a direct effect on the covered-securities market if (for example) SIB *had* purchased covered securities, but not the ones it promised to purchase,

2. Plaintiffs correctly state that petitioners' reading of SLUSA's "in connection with" requirement would also apply to § 10(b), but err in asserting that petitioners' reading would "expand the right of private civil litigants" and that "the number of federal securities lawsuits will rise." The implied private right of action under § 10(b) applies only to purchasers or sellers of securities, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975), and the type of fraud at issue here does not involve victims who are purchasers or sellers of securities (unless the vehicle in which they actually invest happens to be a security). It will thus have no effect on the number of private federal lawsuits, just as *Dabit* did not. *See* 547 U.S. at 74 (SLUSA precludes even "state-law class-action claims for which federal law provides no private remedy").

Plaintiffs are right that the SEC and Justice Department would have jurisdiction over the types of fraud alleged here under petitioners' reading. Resp. Br. 43. But that is as it should be—plaintiffs have alleged securities fraud, and it would still be securities fraud even if the CDs were not themselves securities.

3. Plaintiffs next argue that holding their claims precluded would undermine Congress's decision to "maintain[] the vital role of state law in regulating *non*-national securities." Resp. Br. 44 (quotation omitted). But Congress enacted SLUSA specifically

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even if plaintiffs had no ownership stake in the securities. Pet. Br. 31.

to *displace* states' role in providing civil *class-action* remedies for *covered-securities* fraud, which is what plaintiffs' complaint alleges. Plaintiffs quote the Senate Report accompanying SLUSA, which expressed Congress's intent to preserve "'the appropriate enforcement powers for state regulators, and the right of individuals to bring suit.'" Resp. Br. 44 (quoting S. Rep. No. 105-182, at 8 (1998)); *see also* Resp. Br. 45. True enough. But this is not an action by state regulators or individuals—it is a *class action*, which is exactly the kind of suit SLUSA was enacted to preclude.

Plaintiffs say that applying federal law to the type of scheme at issue here would displace an area of historical state regulation. Resp. Br. 46. But plaintiffs cite no state-law case involving similar facts. Plaintiffs thus fail to identify the state regulation that would be displaced by the application of SLUSA here.

There is also no merit to plaintiffs' argument that precluding aid-and-abet cases like this one would undermine Congress's purpose by displacing the states' ability to allow for secondary-liability class-actions. Resp. Br. 48-49. That SLUSA would preclude a class of state-law claims is no argument against such preclusion, since that was SLUSA's express purpose. More specifically, SLUSA's principal purpose was to preclude plaintiffs from avoiding the PSLRA's limitation on federal securities-fraud actions by filing state-law claims. Pet. Br. 7-8. One of the limits that the PSLRA imposed was allowing only the SEC, and not private plaintiffs, to bring aid-and-abet actions. Pet. Br. 6-7. Congress rejected al-

lowing such private actions because doing so "would be contrary to [the Act's] goal of reducing meritless litigation." S. Rep. No. 104-98, at 19 (1995). Moreover, as just discussed, SLUSA intended to preclude state-law class actions even when no federal action exists. *Dabit*, 547 U.S. at 74. Precluding plaintiffs' state-law aid-and-abet class actions is fully consistent with the purposes of both SLUSA and the PSLRA.

4. Finally, plaintiffs contend that holding SLUSA applicable here would undermine "Congress's determination that SLUSA would be easily administered at the outset of the case." Resp. Br. 50. Plaintiffs argue that petitioners "offer no legal standard at all." *Id.* Wrong. The rule Chadbourne proposes is clear and simple—a false promise about one's own purchases or sales of covered securities is a false promise made "in connection with" the purchase or sale of covered securities. *See supra* at 4-5. There is nothing difficult to administer about that rule. Contrary to plaintiffs' suggestion, this Court need not announce a more categorical "theory" of the "in connection with" rule. The Court has long emphasized that federal securities laws "arise in an area where glib generalizations and unthinking abstractions are major occupational hazards." *SEC v. National Sec., Inc.*, 393 U.S. 453, 465 (1969). The outer boundaries of "in connection with" can be examined in another case—one that actually approaches those boundaries. In this case, the Court need only hold that plaintiffs' class-action complaint is precluded because it so obviously alleges "a misrepresentation … of a material fact in connection with the purchase or

sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A).[6]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[6] Plaintiffs also contend that a holding in petitioners' favor would leave uncertainty over what kind of assets or sets of assets count as "covered securities." Resp. Br. 51. This case does not implicate that question. Both courts below assumed the complaint referred to covered securities, and plaintiffs did not suggest otherwise below or in their opposition to certiorari. *See supra* note 1. Any potential for ambiguity in the meaning of "covered securities" can be addressed in a case actually presenting a dispute over that question.