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Nos. 12-79, 12-86, 12-88

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

BRIEF OF *AMICUS CURIAE* BREAZEALE, SACHSE & WILSON, LLP IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus curiae Breazeale, Sachse & Wilson, LLP is among the oldest and largest law firms in Louisiana. It is a defendant in a securities class action lawsuit under Texas state law currently pending in the U.S. District Court for the Northern District of Texas. The plaintiffs in that lawsuit allege that *amicus* aided and abetted and otherwise participated in a Ponzi scheme perpetrated by R. Allen Stanford. *Amicus* allegedly provided legal services to certain Stanford corporate entities. One of Breazeale's partners, defendant Claude F. Reynaud, Jr., allegedly also served as a director for a Stanford entity. On this basis, plaintiffs seek to hold *amicus* responsible for "at least $300 million," and potentially *all* of the financial losses resulting from the entire Stanford Ponzi scheme, on the theory that *amicus* is "jointly and severally liable . . . for the injuries caused by" all Stanford entities.

Under the Securities Litigation Uniform Standards Act ("SLUSA"), plaintiffs cannot pursue a class action under state law in any state or federal court if they allege 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). As a result of the Fifth Circuit's ruling in *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012)—another case arising out of the Stanford Ponzi scheme—*amicus* has been unable

[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

to obtain dismissal of its lawsuit under SLUSA. Accordingly, *amicus* has a direct and immediate interest in the outcome of this case.

SUMMARY OF ARGUMENT

SLUSA precludes certain class actions under state law if they allege "a misrepresentation . . . in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). SLUSA's "in connection with" requirement must be understood in the context of "the particular concerns that culminated in SLUSA's enactment." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006). A survey of the policy concerns underlying SLUSA and its predecessor, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), confirm that Congress intended the phrase "in connection with" to sweep broadly.

The late 1980s and early 1990s witnessed the proliferation of class actions targeting securities issuers, alleged instigators of securities fraud, and scores of third-party defendants peripherally connected to those primary actors. Notwithstanding several instances of far-reaching securities fraud, Congress saw many of these class actions as purely vexatious. And Congress determined that even meritorious class actions against the instigators of fraud imposed unacceptably high costs on third-party defendants, whose substantial financial resources made them frequent targets but whose connection to the underlying fraud was often remote or uncertain.

Against that backdrop, Congress thus enacted the PSLRA to impose heightened pleading standards in federal securities cases, to limit damages and attorney's fees, and to restrict joint and several

liability for third-party defendants in private actions. Congress also declined to re-establish federal aiding and abetting liability for those defendants. Plaintiffs attempted to circumvent the PSLRA by pursuing exclusively state-law claims in state court against alleged securities fraudsters and the third-party actors who provided them with services. Congress responded with SLUSA, which precludes class action lawsuits that allege "a misrepresentation or omission of a material fact in connection with . . . a covered security" from being brought under state law. 15 U.S.C. § 78bb(f)(1)(A).

The Ponzi scheme perpetrated by R. Allen Stanford is novel only in its magnitude. As the Fifth Circuit acknowledged, the scheme relied on a misrepresentation about covered securities, namely that Stanford's certificates of deposit (CDs) were backed by covered securities. Pet. App. 36. The only question is whether class action lawsuits involving such misrepresentations cease to be "in connection with . . . the purchase or sale of a covered security" if plaintiffs allege additional, unrelated misrepresentations, as the Fifth Circuit held. *See id.* at 38.

Among other factors, Congress's policy objectives in enacting the PSLRA and SLUSA strongly rebut that reading. Congress understood that Ponzi schemes and other large-scale securities frauds often involve numerous misrepresentations unrelated to securities; indeed, the paradigmatic case Congress considered, the Charles Keating class action litigation, involved many such misrepresentations. But Congress believed that the Keating class action litigation would have been subject to the PSLRA and SLUSA had it postdated those statutes—underscoring the breadth of cases Congress intended to cover. The Fifth

Circuit's reading is further undermined by Congress's particular concern that third-party defendants with tenuous connections to primary wrongdoers should not be subjected to disproportionate liability. Those are the very defendants most likely to be charged with numerous misrepresentations in order to connect them to the underlying fraud, and thus least likely to be covered by SLUSA under the Fifth Circuit's test. The cast of third-party defendants currently facing class actions under state law in relation to the Stanford Ponzi scheme vividly illustrates this point. Law firms, banks, auditors, broker-dealers, insurers, and a host of other service providers have been sued for allegedly aiding and abetting or otherwise advancing Stanford's Ponzi scheme. Most are charged with a web of misrepresentations or omissions; most face the prospect of joint and several liability for *all* losses resulting from Stanford's scheme. The allegations against these third-party defendants are indistinguishable from those Congress intended to subject to the PSLRA and SLUSA in order to protect third-party defendants from excessive liability. The Fifth Circuit's reading of SLUSA is incompatible with Congress's policy concerns, and should be rejected.

ARGUMENT

I. The PSLRA and SLUSA Broadly Protect Third-Party Defendants in Securities-Related Class Action Lawsuits

The clear purpose of the PSLRA and SLUSA is to broadly protect all kinds of defendants against "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. By the mid-1990s, members of Congress had become alarmed that "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 private securities litigation, injuring "'the entire U.S. economy.'" *Id.* (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). Congress found that as a result of such abuses, innocent issuers were "often forced to pay exorbitant 'settlements'" simply to avoid the costs of litigation. H.R. Rep. No. 104-369, at 32.

Congress was not merely concerned with how such abuses affected alleged instigators of securities fraud. Congress expressed particular concern that "[u]nderwriters, lawyers, accountants and other professionals" had become "prime targets of abusive securities lawsuits." S. Rep. No. 104-98, at 9 (1995). These third-party defendants were rarely charged with engineering securities frauds themselves. Rather, they were frequent targets of claims that they facilitated securities frauds masterminded by others. These defendants' assets made them attractive targets at a time when federal securities law allowed for joint and several liability. Such lawsuits deterred these putative defendants from providing services because the burdens associated with defending against often meritless class actions were so high. *See Hearings on Implementation of the Private Securities Litigation Reform Act of 1995: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 2 (1997) (statement of Rep. Michael G. Oxley, Chairman); 141 Cong. Rec. S8968 (daily ed. June 23, 1995) (remarks of Sen. Dodd).

In debating the appropriate response to these problems, Congress devoted considerable attention to

class actions arising from securities-related Ponzi schemes and other large-scale securities frauds, which commonly involve a central defendant who employs the services of numerous professional firms. The primary example cited throughout the Congressional record was Charles Keating's far-reaching fraud, which culminated in the collapse of his savings and loan in 1989, costing investors over $250 million. *E.g.*, 141 Cong. Rec. S9208 (daily ed. June 28, 1995) ("[W]e have heard the name of Charles Keating—perhaps one of the most famous of swindlers in recent memory—invoked many times on the floor during this debate."). Keating's "scheme [was] to sell stock and bonds by misrepresenting and omitting information concerning the soundness of [his company]'s financial condition." *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. 425, 427 (D. Ariz. 1992). But those misrepresentations were only part of Keating's scheme; well before he sold investors worthless bonds, he allegedly made a laundry list of other misrepresentations to banking regulators, tax authorities, and others, which facilitated illegal transfers between Keating's savings and loan and its parent corporation and masked the savings and loan's risky loans and investments. *See, e.g.*, *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 907-08 (D.D.C. 1990).

The resulting class action lawsuits named an unprecedented number of defendants, including "more than fifty individuals, ten banks, four accounting firms, [and] half a dozen law firms" that had dealings with Keating. Patrick Dillon & Carl M. Cannon, *Circle of Greed* 109 (2010). Lawyers who represented the class testified to Congress that, because Keating was judgment-proof, the professionals who worked with him paid the vast majority of the recovery

obtained under the federal securities laws. *See Hearings on Common Sense Legal Reform Act: Hearing Before the Subcomm. on Telecomm. and Fin. of the H. Comm. on Commerce*, 104th Cong. 105-06 (1995) (testimony of William Lerach); *Hearings on Securities Litigation Reform: Hearing Before Subcomm. on Telecomm. and Fin. of the H. Comm. on Energy and Commerce*, 103d Cong. 255-56, 287 (1994) (testimony of Leonard Simon) ("*Hearings on Securities Litigation Reform*"). These attorneys warned Congress that its contemplated changes to the securities laws would materially impact future cases similar to the Keating class action lawsuits. As the class counsel in the Keating litigation, Leonard Simon, stated: "If the provisions of [the House's proposed bill] had been the law in 1989, we would almost certainly not have brought the Keating case. If we had brought the case, at best we would have been able to recover only a fraction of what we have been able to recover so far for the class members." *Hearings on Securities Litigation Reform* 301.

Congress, however, had no doubt that class actions against Keating and similarly culpable actors should and would continue to be maintained under federal securities laws after the PSLRA. *See, e.g.*, 141 Cong. Rec. S12203 (daily ed. Aug. 10, 1995) (remarks of Sen. Dodd). Congress believed that imposing tighter limits on securities class actions would not prevent plaintiffs from prevailing against defendants like Keating. *See, e.g.*, 141 Cong. Rec. S9034 (daily ed. June 26, 1995) (remarks of Sen. Bennett); 141 Cong. Rec. H2767 (daily ed. Mar. 7, 1995). But Congress also objected that "deep pocketed defendants, including accountants, underwriters, and other individuals who may be covered by insurance," were being singled out "without regard to their actual culpability."

H.R. Rep. No. 104-369, at 31; *see* S. Rep. No. 104-98, at 9. Such defendants, Congress concluded, required specific protections.

Congress's deliberations culminated in the PSLRA, which was designed to broadly "protect investors, issuers, and all who are associated with our capital markets." H.R. Rep. No. 104-369, at 32. Congress recognized that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses," *id.* at 31, but sought to ensure a proper balance between investor recovery and the burdens on less culpable defendants. The PSLRA enacted provisions designed to make it less appealing for plaintiffs to bring vexatious securities class actions under federal law. The Act capped damages and attorneys' fee awards; imposed heightened pleading standards for federal claims; allowed defendants to seek stays of discovery pending rulings on motions to dismiss; set criteria for selecting and compensating lead plaintiffs in class actions; and authorized hefty sanctions for frivolous lawsuits. *See* 15 U.S.C. § 78u-4. And the PSLRA did so regardless of whether the defendants in such actions are issuers, primary instigators of securities frauds, or third-party actors like accountants, insurers, or law firms. *Id.*

The PSLRA also specifically addressed Congress's concern that auditors, law firms, and other professionals had been disproportionately forced to pay damages to victims of large-scale frauds when their conduct was less culpable. The PSLRA eliminated joint and several liability unless plaintiffs show that a defendant knowingly violated the securities laws or, in some instances, the damages share owed by another party is uncollectible. 15 U.S.C. § 78u-4(f).

And the PSLRA deliberately left intact the Court's recent holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that private parties could not sue those who merely aided and abetted primary violators of securities laws. *See* S. Rep. No. 104-98, at 19; *Stoneridge Inv. Partners, LLC v. Scientific Atlanta*, 552 U.S. 148, 162 (2008).

Congress soon realized, however, that the PSLRA was being circumvented by creative plaintiffs who simply reframed federal securities class actions as state-law claims. *See Dabit*, 547 U.S. at 82. Again, members of Congress noted that the problem was not limited to suits against issuers. As Representative William Tauzin explained: "We are back here today because . . . members of the trial board who were pressing these cases before simply did an end around. They went to State court . . . to do exactly what they used to do in Federal court," and pursued not only securities issuers and other alleged primary instigators, but also "the accountants, anybody else associated with a company . . . alleging fraud." 144 Cong. Rec. H10786 (daily ed. Oct. 13, 1998); *see* 144 Cong. Rec. H6057 (daily ed. Jul. 21, 1998) (remarks of Rep. White). The Keating class action lawsuits were once again cited as an example of the type of securities class action against "accounting firms, law firms, and investment bankers" that would have faced heightened standards under the PSLRA, and that plaintiffs' attorneys would have attempted to bring under state law. *Hearings on Securities Litigation Reform* 102. And as Mr. Simon testified, SLUSA would have precluded such state-law claims against Keating and various third-party defendants. *Id.*

Congress concluded that securities-related class actions brought under state law represented an "unforeseen 'loophole,'" and enacted SLUSA in response. S. Rep. No. 105-182, at 9 (1998). SLUSA was intended to "enact national standards" for a broad range of securities class actions. Pub. L. No. 105-353, § 2(5) (1998). Subject to narrow exceptions, SLUSA sought to ensure that "class actions relating to [covered securities] . . . alleging fraud or manipulation . . . [were] maintained pursuant to the provisions of federal securities laws, in federal court." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). Congress in no way intended SLUSA to modify or limit the PSLRA, but rather to stop the PSLRA's goals from being circumvented through artful pleading. Pub. L. No. 105-353, § 2(2)-(3), (5); S. Rep. 105-182, at 9.

Thus, SLUSA, like the PSLRA, extends to all "securities class action lawsuits *involving* nationally traded securities," Pub. L. No. 105-353, § 2(5) (emphasis added), *i.e.*, class actions that allege "a misrepresentation or omission of a material fact in connection with . . . a covered security." 15 U.S.C. § 78bb(f)(1)(A). Such lawsuits, if brought under state law, are precluded; SLUSA requires class-action plaintiffs to sue in federal court, under the more robust federal rules limiting such claims. 15 U.S.C. § 78bb(f)(1)-(2); *see also* H.R. Rep. No. 105-803, at 13.

II. The Fifth Circuit's Decision Is Incompatible with Congress's Policy Judgments

In the Fifth Circuit's view, Stanford's Ponzi scheme *did* involve a misrepresentation about securities: Stanford (and, purportedly, several third-party defendants) falsely claimed that his CDs were safe investments because they were backed by his bank's

holdings of various covered securities. Were that the only alleged misrepresentation, SLUSA would preclude state-law claims arising from Stanford's fraud, as well as claims against third-party defendants who provided Stanford various services. But because that misrepresentation was accompanied by others—for instance that Stanford's CDs were generally sound, that regulators were carefully overseeing Stanford's bank, and that the bank was highly professional—the Fifth Circuit deemed misrepresentations about securities too "tangentially related" to Stanford's fraud to trigger SLUSA. Pet. App. 38.

The Fifth Circuit's holding that SLUSA preclusion applies only when a misrepresentation involving securities is "more than tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendants' fraud," *id.* (footnotes omitted), is inconsistent with the policy concerns animating SLUSA and the PSLRA. That holding ignores Congress's understanding that class actions involving numerous misrepresentations unrelated to securities would nonetheless be subject to the PSLRA and to SLUSA. That holding also ignores Congress's special solicitude for third-party defendants with limited connections to primary fraudsters—the very defendants most likely to face allegations the Fifth Circuit's test would deem unrelated to covered securities.

A. Congress Expected SLUSA To Apply Irrespective of Whether Misrepresentations About Covered Securities Were the "Heart" of a Fraud

Throughout debates over the PSLRA and SLUSA, Congress—not to mention the plaintiffs' bar—assumed that class actions against Keating and asso-

ciated defendants would have been sufficiently connected to covered securities to trigger SLUSA. *See supra* at 9-10. Yet Keating's scheme plainly involved a host of misrepresentations unrelated to securities. Keating misrepresented to federal banking regulators that his intent in acquiring Lincoln, an ailing savings and loan business, was to keep the existing management and continue lending to lower-income members of the surrounding community. He instead removed Lincoln's old managers, moved its operations, exited the mortgage business, began making speculative loans to high-risk enterprises, and heavily invested in junk bonds. *Wall*, 743 F. Supp. at 907-08. He misrepresented $94 million in Lincoln's tax liabilities through a tax-sharing agreement with Lincoln's parent company, which Keating also controlled; Keating used these misrepresentations to the federal government to effectively loan money from Lincoln to its parent. *Id.* at 908-11. He engineered numerous misstatements in Lincoln and its parent's financial statements that showed illusory profits justifying those large transfers. *Id.* at 911. Keating's misrepresentations to buyers of his company's bonds came only later, and built on these initial misrepresentations; he pitched his company's bonds as safe investments because of the purported financial soundness of Lincoln and its parent. *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. at 427. And the third-party defendants who provided Keating with legal, financial, and other services were alleged to have made additional layers of misrepresentations or omissions to various regulators unrelated to securities. *See In re Am. Cont'l Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1441-54 (D. Ariz. 1992).

If the Keating class action litigation was Congress's idea of when misrepresentations about covered securities were central to a fraud, the alleged misrepresentations involved in Stanford's scheme would plainly satisfy that bar. Stanford's scheme, to a far greater extent than Keating's, depended on convincing would-be purchasers that his CDs were sound investments capable of achieving substantial returns—a claim Stanford established by misrepresenting that the CDs were backed by "a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." Pet. App. 8a-9a. But for that false assurance, investors attested, Stanford's scheme could never have succeeded. Willis Br. 20. Keating, on the other hand, allegedly perpetrated other schemes to strip his savings and loan of assets and transfer them to its parent company for his personal use.

Congress, however, attached no significance to the nature or magnitude of Keating's various misrepresentations, either as it applied to suits against Keating himself or any of the more removed third-party defendants. Rather, Congress assumed that had the Keating litigation arisen after the PSLRA and SLUSA, all class actions against Keating and the third-party actors who provided him services would have unfolded in federal court, subject to the PSLRA's heightened requirements. *See, e.g.*, H.R. Rep. No. 105-803, at 13. Congress disregarded the relative importance of various misrepresentations in the Keating litigation for good reason. One of the PSLRA's policy objectives was to stop plaintiffs from singling out deep-pocketed defendants without regard to their culpability. And SLUSA's aim was to stop those same class-action firms from "evad[ing]" or

"circumvent[ing]" the PSLRA by reframing securities-related class actions under state law. *Id.* at 13-14.

Those policy motivations render the Fifth Circuit's interpretation implausible. Congress can hardly have intended to adopt an interpretation of the "in connection with" requirement that would reward those same firms for evading SLUSA by embellishing their complaints with additional allegations of misrepresentations unrelated to securities. Yet the Fifth Circuit's interpretation of the "in connection with" requirement invites just such manipulation, by hinging preclusion of state-law claims on an amorphous analysis of tangentiality. Depending on the circumstances of a particular defendant, and the skill with which a complaint is drafted, some class action lawsuits involving nationally traded securities will be subject to the PSLRA. Meanwhile, other class action lawsuits—perhaps even arising out the same underlying fraudulent scheme—will reap the benefits of proceeding under state law.

B. Congress Was Particularly Sensitive To the Need To Protect Peripheral Third-Party Actors Under the PSLRA and SLUSA

Out of all categories of defendants in securities-related class actions, Congress demonstrated special concern that defendants with a more remote role in an alleged fraud—*e.g.*, alleged aiders and abettors—should not face liability in private suits. The Fifth Circuit's interpretation of SLUSA's "in connection with" requirement would eviscerate Congress's considered judgment in this area.

Congress enacted the PSLRA in no small part because it was troubled by evidence that auditors,

law firms, and others who provided services to Keating had been "prime targets" of abusive securities litigation. S. Rep. No. 104-98, at 9; *see* H.R. Rep. No. 104-369, at 31. The law firm Jones Day was sued for aiding and abetting and otherwise conspiring with Keating by lobbying on his behalf, making political contributions for his companies, advising those companies in their dealings with bank examiners, and reviewing SEC registration statements and prospectuses. *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1450-54. Touche Ross (now Deloitte & Touche), the auditing firm, allegedly violated federal securities laws by accepting an engagement to audit Keating's companies, starting work on the audit, and failing to detect or stop Keating's fraud—even though the audit was never completed. *Id.* at 1441-42. Lexecon, an economic consulting firm, was sued for preparing reports that generally vouched for the soundness of one Keating company; Keating allegedly used the reports to build credibility with federal regulators. *Id.* at 1448-49.

Virtually all of these defendants were sued for allegedly aiding and abetting Keating's fraud, for misrepresentations or omissions to regulators, or for impeding the discovery of Keating's fraud. *See id.* at 1441-54. All these third-party defendants were equally subject to joint and several liability, as well as burdensome discovery and all the other procedural devices Congress found troubling when employed in securities class actions. And virtually all recovery for Keating's victims ended up coming from these third-party defendants, since Keating himself was insolvent. *See Hearings on Common Sense Legal Reform Act: Hearing Before the Subcomm. on Telecomm. and Fin. of the H. Comm. on Commerce*, 104th Cong. 105-06 (1995) (testimony of William Lerach); *Hearings on*

Securities Litigation Reform 56, 287 (testimony of Leonard Simon).

Congress was well aware that the price of protecting these defendants from disproportionate liability would, in some cases, be to limit recovery for defrauded investors. Congress understood that almost half of the recovery in the Keating case came from aiders and abettors who would have been immune under the federal securities laws after *Central Bank of Denver*. *See, e.g.*, 141 Cong. Rec. S9110 (daily ed. June 27, 1995). Opponents warned that "[i]f [the PSLRA and SLUSA] had been in place at the time of the Keating fraud . . . there would have been no ability to recover against the fraudulent activity of the accomplices—the accountants, the lawyers, and others." 144 Cong. Rec. S4814 (daily ed. Mar. 13, 1998) (remarks of Sen. Bryan); *see* 141 Cong. Rec. H14048 (daily ed. Dec. 6, 1995) (remarks of Rep. Conyers). During the SLUSA debates, plaintiffs' attorneys from the Keating case cited lack of aiding and abetting liability and elimination of joint and several liability as two of the reasons why "the Keating case would have been problematic under the PSLRA, and the preemption of State law could have doomed the investers completely."[2] Yet Congress deliberately chose not to overrule *Central Bank of Denver* and affirmed in the PSLRA and SLUSA that aiding and abetting liability would be unavailable in

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[2] *Hearings on Securities Litigation Abuses: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs, 105th Cong.* 102 (1997) (statement of Leonard B. Simon); *Implementation of the Private Securities Litigation Reform Act of 1995: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 82 (1997) (same).

securities-related class actions involving nationally traded securities. *See* 15 U.S.C. § 78t(e). Congress likewise eliminated joint and several liability for third-party defendants absent proof of knowing violations of securities laws. 15 U.S.C. § 78u-4(f)(2)(A).

Congress's policy preferences as to third-party defendants are unmistakable. They are also fatal to the Fifth Circuit's interpretation of SLUSA, which would turn third-party defendants into second-class citizens for purposes of SLUSA's protections. Under the Fifth Circuit's perverse reading of the "in connection with" requirement, defendants alleged to have aided and abetted a securities-related fraud would be *most* likely to escape SLUSA preclusion, and *most* likely to therefore face joint and several liability under state law. Since defendants alleged to have aided and abetted a fraud will, by definition, be one step removed from the central fraud, complaints against them are likely to require additional allegations in order to explain their role and basis for liability. Thus, due to the nature of aiding and abetting claims, plaintiffs suing such defendants can more easily portray an alleged misrepresentation in connection with securities—even if key to the central fraud—as "merely tangential[]." Pet. App. 37–38, 42.

The claims against third-party defendants who provided services to and allegedly advanced Stanford's Ponzi scheme illustrate this problem. The Willis and BMB Defendants sold Stanford entities insurance policies and confirmed those entities were covered; they have been sued for allegedly failing to detect Stanford's fraud and for purportedly legitimizing his business. Proksauer Rose and Chadbourne & Parke allegedly aided and abetted Stanford's scheme by providing various legal services to Stanford entities.

Amicus allegedly aided and abetted Stanford by providing various legal services to Stanford entities; the law firm Greenberg Traurig faces very similar claims. Pershing LLC, a broker-dealer who handled wire transfers from Stanford's U.S. investors to Stanford's Antiguan accounts, was sued for failing to identify and stop Stanford's fraud. HSBC and Trustmark National Bank have been sued for facilitating the "flow of money" to Stanford. BDO LLP, which provided tax, auditing, and other services to Stanford entities, allegedly failed to exercise due diligence and uncover Stanford's fraud.[3]

Under the Fifth Circuit's reading, most of these complaints might be construed to involve a host of misrepresentations or omissions; nearly all of these defendants, for instance, are accused of somehow preventing governmental agencies from discovering Stanford's fraud. Yet the litany of allegations against these third-party defendants are indistinguishable from the class actions that prompted Congress to protect third-party defendants through the PSLRA and SLUSA. And the Stanford third-party defendants face exactly the same threat of disproportionate

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[3] JA 649-57, 751-66 (Willis Complaint ¶¶ 75-90 & Ex. 4); Chadbourne Br. at 10; First Amended Complaint at 59, *Official Stanford Investors Comm. v. Breazeale, Sachse & Wilson, LLP*, No. 3:11-cv-00329 (N.D. Tex. July 7, 2011) (Docket # 19); Complaint at 87, 153-54, *Janvey v. Greenberg Traurig, LLP*, No. 3:12-cv-04641 (N.D. Tex. Nov. 15, 2012) (Docket # 1); Amended Consolidated Complaint at 53, *Turk v. Pershing LLC*, No. 3:09-cv-02199 (N.D. Tex. June 18, 2012) (Docket # 76); Complaint at 43, *Mendez v. Pershing LLC*, No. 3:11-cv-00314 (N.D. Tex. Feb. 16, 2011) (Docket # 1); First Amended Petition at 2-3, *Rotstain v. Trustmark Nat'l Bank*, No. 3:09-cv-02384 (S.D. Tex. Nov. 13, 2009) (ECF # 1-5); Complaint at 22, 28, *Wilkinson v. BDO USA, LLP*, No. 3:11-cv-01115 (N.D. Tex. May 26, 2011) (Docket # 1).

liability that led Congress to enact SLUSA. Many state laws not only allow aiding and abetting liability, but also subject such defendants to joint and several liability. Class-action plaintiffs have sought to hold many of the above defendants—like the third-party defendants in the Keating litigation—liable for the entirety of the losses from Stanford's Ponzi scheme.[4] These cases, in sum, embody precisely the policy concerns that motivated the PSLRA and SLUSA, and should be subject to the remedies Congress chose.

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[4] *E.g.*, Willis Br. at 12 ("Respondents suggest that Willis and BMB are liable for all of their losses because they failed to detect Stanford's fraud"); First Amended Complaint at 59, *Official Stanford Investors Comm. v. Breazeale, Sachse & Wilson, LLP*, No. 3:11-cv-00329 (N.D. Tex. July 7, 2011) (Docket # 19) (alleging joint and several liability and damages of "at least $300 million); Complaint at 164, *Janvey v. Greenberg Traurig, LLP*, No. 3:12-cv-04641 (N.D. Tex. Nov. 15, 2012) (Docket # 1) (alleging class damages of $7 billion proximately caused by defendants); Complaint at 53, *Wilkinson v. BDO USA, LLP*, No. 3:11-cv-01115 (N.D. Tex. May 26, 2011) (Docket # 1) (alleging first class damages of $7.2 billion proximately caused by defendants).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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