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

In the Supreme Court of the United States

CHADBOURNE & PARKE LLP, PETITIONER

v.

SAMUEL TROICE, ET AL.

WILLIS OF COLORADO INCORPORATED, ET AL., PETITIONERS

v.

SAMUEL TROICE, ET AL.

PROSKAUER ROSE LLP, PETITIONER

v.

SAMUEL TROICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act (SLUSA) precludes most state-law class actions in which the plaintiffs allege misrepresentations "in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(A). The term "covered security" encompasses, *inter alia*, securities listed on a regulated national exchange. See 15 U.S.C. 77r(b) (2006 & Supp. V 2011), as amended by Pub. L. No. 112-106, §§ 305(a), 401(b), 126 Stat. 322, 325; 15 U.S.C. 78bb(f)(5)(E). The questions presented are as follows:

1. Whether SLUSA precludes a class action alleging that plaintiffs purchased uncovered securities in reliance on misrepresentations that those securities were backed by investments in covered securities.

2. Whether the court of appeals correctly held that SLUSA does not preclude respondents' claims against persons who are alleged to have aided and abetted the primary violators.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions should be denied.

STATEMENT

1. Section 10(b) of the Securities Exchange Act of 1934 (1934 Act) makes it unlawful to "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 [Securities and Exchange] Commission may prescribe." 15 U.S.C. 78j(b). The Securities and Exchange Commission (SEC or Commission) issued Rule 10b-5 to implement Section 10(b). Rule 10b-5 declares it unlawful, "in connection with the purchase or sale of any security," to "employ any device, scheme, or artifice to defraud"; to "make any untrue statement of a material fact or * * * omit to state a material fact necessary in order to make the statements made * * * not misleading"; or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5.

The Commission may bring a civil enforcement action against "any person" who has "violated any provision of [the 1934 Act]" or "the rules or regulations thereunder." 15 U.S.C. 78u(d)(3)(A); see 15 U.S.C. 78u(d)(1) (authorizing Commission actions for prospective injunctive relief whenever a person is "about to engage" in a violation). The United States may bring criminal prosecutions for willful violations. 15 U.S.C. 78ff(a). Section 10(b) has also been construed to afford an implied right of action to private parties, although this Court has placed various limitations on such private lawsuits. See, *e.g.*, *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 191 (1994); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 725, 754-755 (1975).

Prompted by concern that the salutary purposes of private securities litigation were being "undermined by * * * abusive and meritless suits," H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995), Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. The PSLRA established numerous reforms—including heightened pleading standards, an automatic stay of discovery, and a safe harbor for forward-looking statements—that apply to securities-fraud actions brought under federal law. See 15 U.S.C. 78u-4(b) (2006 & Supp. V 2011); 15 U.S.C. 78u-5.

After the PSLRA was enacted, however, Congress observed a sharp increase in the number of securities-related class actions that alleged only state-law claims. In response to that development, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227. SLUSA reflects Congress's view that the growing prevalence of state-law securities-fraud class actions had "prevented [the PSLRA] from fully achieving its objectives" of "prevent[ing] abuses in private securities fraud lawsuits." SLUSA § 2(1)-(3), 112 Stat. 3227; see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006). Congress therefore found it "appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators." SLUSA § 2(5), 112 Stat. 3227.

To that end, Congress directed that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging" either "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or "any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1); see 15 U.S.C. 77p(b).[1] A covered class action is one in which damages are sought on behalf of more than 50 people. 15 U.S.C. 78bb(f)(5)(B)(ii). A covered security includes one that was listed on a regulated national exchange and traded nationally "at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred." 15 U.S.C. 78bb(f)(5)(E); see 15 U.S.C. 77r(b) (2006 & Supp. V 2011), as amended by Pub. L. No. 112-106, §§ 305(a), 401(b), 126 Stat. 322, 325.

SLUSA's "preclusion provision" does not bar state-law claims entirely. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 637 n.1 (2006). Rather, it makes certain "claims nonactionable through the class-action device in federal as well as state court." *Ibid.* If a suit that falls within the scope of the preclusion provision is brought in state court, the action is "removable to the Federal district court for the district in which the action is pending," 15 U.S.C. 78bb(f)(2), where it is subject to dismissal.

[1] SLUSA includes several exceptions to preclusion, none of which is relevant here. See 15 U.S.C. 78bb(f)(3) (exempting from preclusion a "covered class action * * * based upon the statutory or common law of the State in which the issuer is incorporated * * * or organized"; an action brought by a "class comprised solely of * * * States, political subdivisions, or State pension plans"; and an otherwise "covered class action" if it "seeks to enforce a contractual agreement between an issuer and an indenture trustee").

2. a. This case arises from a multi-billion-dollar Ponzi scheme run by Allen Stanford and various entities that he controlled. Among those entities was Antigua-based Stanford International Bank (SIB), which issued fixed-return certificates of deposit (CDs) that SIB falsely claimed were backed by safe, liquid investments. See Pet. App. 6a-7a, 37a.[2] In fact, the claimed investments did not exist, and "SIB had to use new CD sales proceeds to make interest and redemption payments on pre-existing CDs." *Id.* at 6a (quoting *Janvey* v. *Alguire*, 647 F.3d 585, 590 (5th Cir. 2011)).

Multiple suits were filed after the fraud was discovered. Two groups of Louisiana investors filed suits in state court in Baton Rouge against a number of Stanford companies and employees (the SEI Defendants), claiming violations of Louisiana law. Pet. App. 7a. A different group of investors brought separate class actions in federal court against SIB's insurance brokers (the Willis Defendants) and SIB's lawyers (the Proskauer Defendants), claiming violations of Texas law. *Id.* at 9a.[3] The complaints alleged that the SEI Defendants and the Willis Defendants had falsely told the plaintiffs that the CDs were a good investment because (*inter alia*) 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." *Id.* at

[2] All citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 12-79.

[3] In addition, the SEC brought an action alleging fraud with respect to the CDs (which are "securities" within the meaning of Section 10(b), though not "covered securities" within the meaning of SLUSA), and the United States prosecuted Stanford for fraud, conspiracy, and obstruction of justice. See Pet. App. 6a-7a.

8a; see *id.* at 9a. The Proskauer Defendants were alleged to have engaged in civil conspiracy and to have aided and abetted the primary violations, but they were not alleged to have made any misrepresentations directly to the plaintiffs. *Id.* at 9a.

The SEI defendants removed the Louisiana cases to federal court, and all of the actions were ultimately transferred to the Northern District of Texas. The district court dismissed the complaints as precluded under SLUSA. The court held that the CDs themselves are not "covered securities," see Pet. App. 60a-61a, but that the plaintiffs had nevertheless alleged misrepresentations "made in connection with transactions in covered securities," *id.* at 63a.[4]

The district court based that holding on two independent grounds. First, the court focused on the allegation that respondents had bought CDs due to the false representation that SIB invested its assets in "highly marketable securities issued by stable governments, strong multinational companies and major international banks." Pet. App. 64a. The court found that SIB had "led the Plaintiffs to believe that the SIB CDs were backed, at least in part, by SIB's investments in SLUSA-covered securities." *Id.* at 64a-65a; see *id.* at 65a n.11 (noting "the prevalence of multinational companies on national stock exchanges"). Relying on "the Eleventh Circuit's approach," the court concluded that preclusion is required where plaintiffs "premise[] their claims on * * * 'fraud that induced [the plaintiffs] to invest.'" *Id.* at 64a (quoting *Instituto de Prevision*

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[4] The district court's opinion analyzes whether the Louisiana actions are precluded by SLUSA; the court later issued separate orders dismissing the other actions for the reasons set forth in that opinion. See Pet. App. 8a, 10a, 13a.

Militar v. *Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) (alterations and omissions in original). Second, the court held that "[p]laintiffs' allegations * * * reasonably imply" that some investors had sold covered securities in order to obtain the money to purchase CDs. *Id.* at 67a. In the court's view, "SLUSA preclusion applies even if only a single plaintiff sold a single SLUSA-covered security" to finance such an "acquisition." *Id.* at 68a-69a.

b. The court of appeals reversed. Pet. App. 1a-41a. The court stated that "a misrepresentation is 'in connection with' the purchase or sale of securities if there is a relationship in which the fraud and the stock sale coincide or are more than tangentially related." *Id.* at 32a (quoting *Madden* v. *Cowen & Co.*, 576 F.3d 957, 965-966 (9th Cir. 2009)) (emphasis omitted). The court concluded that neither of the grounds for preclusion invoked by the district court satisfied that standard.

First, the court of appeals deemed the "references to SIB's portfolio being backed by 'covered securities' to be merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendants' fraud." Pet. App. 36a; see *id.* at 37a. In the court's view, the alleged misrepresentation about the nature of SIB's investments was only one of a "host of (mis)representations"—including statements that the bank was insured, professionally staffed, and carefully audited—that were intended to induce investors to purchase the CDs. See *id.* at 35a-36a & n.3. The court also observed that, because the CDs promised a fixed rate of return, they were not "tied to the success of any of SIB's purported investments" in covered securities. *Id.* at 37a; see *ibid.* (stating that plaintiffs did not allege that "they deposited their money in the bank for the purpose of purchasing covered securities") (internal quotation marks omitted).

Second, the court of appeals held that there was an insufficient "connection between the fraud and [the] sales" of covered securities that certain investors had undertaken to raise money to buy CDs. Pet. App. 39a. The court concluded that "[c]onstruing SLUSA to depend on the source of funds where the defendant does not care leads to absurd results," permitting two virtually identical claims to be treated differently under SLUSA. *Id.* at 39a n.7.

Finally, the court of appeals held that SLUSA did not preclude the claims against the Proskauer Defendants for allegedly "aiding and abetting the Stanford Ponzi scheme." Pet. App. 40a. The court noted that, while "[t]he core allegation" against those defendants is that "the Stanford Ponzi scheme could not have been accomplished" without their assistance, the Proskauer Defendants were also alleged to have made misrepresentations to the Commission that it lacked authority to investigate the Stanford entities. *Id.* at 40a-41a. The court concluded that those statements did not trigger SLUSA preclusion because they were "not more than tangentially related to the purchase or sale of covered securities." *Id.* at 41a.

DISCUSSION

Although the Fifth Circuit erred in its application of SLUSA's preclusion provision, its decision does not conflict with any decision of another circuit. This case, moreover, involves an unusual fact pattern, in which wrongdoers made misrepresentations about their own purchases of SLUSA-covered securities in order to induce plaintiffs to purchase *un*covered investment vehicles. A holding that SLUSA applies (or does not apply) in this setting would do little to guide lower courts in resolving the mine run of SLUSA controversies. Further review is not warranted.

1. As this Court recognized in *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71 (2006), the term "in connection with" means the same thing in SLUSA that it means in Section 10(b), and therefore must be given a "broad construction." *Id.* at 85; see, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (explaining that the phrase "in connection with the purchase or sale" of a security in Section 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes"). To be sure, "the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)." *Id.* at 820. But "it is enough" to meet the "in connection with" requirement "that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Dabit*, 547 U.S. at 85 (quoting *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1997)); see *Zandford*, 535 U.S. at 824 (holding that "a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide" falls within the scope of Section 10(b)); *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971) (holding that Section 10(b) was violated because "[t]he crux of the present case is that [plaintiff] suffered an injury as a result of deceptive practices touching its sale of securities as an investor").

The language the Fifth Circuit used to describe the "in connection with" requirement is faithful to those precedents. The court stated that "a misrepresentation is 'in connection with' the purchase or sale of securities if there is a relationship in which the fraud and the stock sale coincide or are more than tangentially related." Pet. App. 32a (quoting *Madden*, 576 F.3d at 965-966) (emphasis omitted). That is essentially a restatement of this Court's rulings that "coincide[nce]" or "touching" satisfies the "in connection with" requirement. *Dabit*, 547 U.S. at 85; *Bankers Life*, 404 U.S. at 12-13. It also ensures that the statutory phrase—and the SEC's enforcement power under Section 10(b)—will be given real breadth, without expanding so far as to sweep in ordinary fraud that has only a fortuitous linkage to a securities transaction. See Pet. App. 32a (citing *Zandford*, 535 U.S. at 820).

The Fifth Circuit erred, however, in applying that standard to the facts of this case. In assessing whether the alleged fraud was "more than tangentially related" to a purchase or sale of covered securities, the court underestimated the role that the statements about SIB's investment portfolio played in the Stanford Ponzi scheme. The "crux" of the fraud, *Bankers Life*, 404 U.S. at 12-13; Pet. App. 36a, was to convince investors that the CDs were safe, liquid investments that would deliver high returns. The representation that the CDs would be 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, was important to the success of that tactic. There was no other apparent source of the funds necessary to make the CDs function "[l]ike well-performing equities," *id*. at 11a, and to allow the investors to realize the financial benefits they had been promised. Indeed, the plaintiffs in one of the Louisiana actions specifically alleged that they "would not have purchased the SIB CDs" if they had "been aware of the truth" that SIB's "portfolio consisted primarily of illiquid investments or no investments at all." *Id.* at 13a. Accordingly, the purported existence of covered securities transactions was far from "tangential" to the fraudulent scheme and the misrepresentations that supported it.

The court of appeals appeared to believe (Pet. App. 35a-37a) that the importance of the statements about SIB's transactions in covered securities was diminished by the existence of various other misrepresentations (*e.g.*, that SIB was scrutinized by government auditors, that it employed a professional staff, and that the CDs were protected by an insurance policy from Lloyd's of London, see *e.g.*, *id.* at 9a, 37a) allegedly made to convince investors that the CDs were a sound purchase. That is incorrect. Those other misrepresentations could certainly have been relevant to a prospective purchaser. But only the assertions about covered securities would have answered investors' questions about *how* SIB would be able to deliver the promised high returns on the CDs—questions that any reasonable investor would have asked before buying a financial instrument from a foreign bank. And many of the other misrepresentations to which the court of appeals referred seem to have been designed to bolster the lie about the backing securities, suggesting to investors that trained staff operating under knowledgeable supervision were successfully carrying out trades in "highly marketable securities" to ensure the financial health of the bank. See *id.* at 8a, 37a.

To be sure, the scheme alleged here is relatively far removed from the paradigmatic SLUSA-precluded case. At the core of SLUSA preclusion are cases in which the defendant misrepresents facts about a covered security in order to induce purchases or sales *of that security*, or to affect the market in that security. Cf. *Dabit*, 547 U.S. at 89 (explaining that "fraudulent manipulation of stock prices * * * unquestionably qualifies as fraud 'in connection with the purchase or sale of securities' as the phrase is defined in" this Court's decisions). See Pet. App. 60a (stating that "direct transactions in 'covered securities,' such as a plaintiff's purchase of stock on the New York Stock Exchange, most readily present opportunities for SLUSA preclusion"). In this case, by contrast, the investors to whom the misrepresentations were made never purchased any covered securities themselves, and the fraud had no prospect of affecting the market in such securities. Rather, the wrongdoers falsely claimed to be owners of covered securities in order to induce the fraud victims to purchase *un*covered investment vehicles.

Nevertheless, although this case falls outside the heartland of SLUSA preclusion, it is covered by the plain terms of the statute. *Dabit* makes clear that the necessary "connection" can exist even when the plaintiff was not induced to purchase or sell a covered security. See *Dabit*, 547 U.S. at 85. It is also clear that the "in connection with" requirement can be satisfied "even though the person or entity defrauded is not the other party to the trade." *O'Hagan*, 521 U.S. at 656. False statements about one's own transactions in covered securities are naturally characterized as misrepresentations "in connection with the purchase or sale of" such securities. And while Stanford and SIB did not seek to induce investors to purchase covered securities, their misrepresentations about their own holdings were crucial to the Stanford fraud. Reading the "in connection with" requirement "flexibly," *Zandford*, 535 U.S. at 819, the allegations in this case establish a connection between the misrepresentations and covered securities transactions that is sufficient to trigger SLUSA preclusion.

2. a. Although the Fifth Circuit applied its "more than tangentially related" analysis too stringently, its ruling does not conflict with any decision of another circuit. Petitioners contend (*e.g.*, 12-79 Pet. 18-21) that other courts of appeals use words to describe the "in connection with" requirement—"induce," "depend," and "necessarily involve"—that would have changed the outcome here. But none of the decisions on which petitioners rely analyzed a multi-layered transaction in which misrepresentations concerning supposed purchases and sales of covered securities induced investors to buy uncovered securities. The language used by other circuits is not designed for grappling with such a situation, and it is not clear how those courts would rule if they were confronted with it.

Petitioners place particular reliance on the Eleventh Circuit's decision in *Instituto de Prevision Militar* v. *Merrill Lynch*, 546 F.3d 1340 (2008) (*IPM*), on the ground that the district court in this case relied on *IPM* and held that respondents' suits were precluded. See, *e.g.*, 12-79 Pet. 17-19; Pet. App. 64a. In *IPM*, the plaintiff gave money to a company called Pension Fund of America (PFA) to place in retirement trust accounts, which the court held were "covered securities." 546 F.3d at 1351. PFA stole the money instead, and the plaintiff subsequently sued Merrill Lynch under state law for promoting PFA and failing to stop the theft. See *id.* at 1343-1344 (explaining that Merrill Lynch had deposited the plaintiff's money "in an account 'titled in the name of'" PFA and had permitted PFA to transfer money out of the account). The Eleventh Circuit noted that a fraud can be "in connection with" a securities transaction where a defendant accepts money "'as payment for securities' with no intent to deliver them." *Id.* at 1349 (quoting *Grippo* v. *Perazzo*, 357 F.3d 1218, 1224 (11th Cir. 2004), and citing *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 597 (2001)). The court held that the suit was precluded because the plaintiff "is complaining about fraud that induced it to invest with PFA." *Ibid*; see *id.* at 1350.

Petitioners' claim of a conflict with *IPM* is mistaken because *IPM* differs from this case in a crucial respect. In *IPM*, PFA falsely represented to the victim of the fraud that it would become the owner of covered securities, namely the retirement trust accounts. See 546 F.3d at 1342-1343, 1350-1351. Here, by contrast, SIB falsely represented that the fixed-return CDs would be backed by covered securities, but respondents were not promised any ownership or similar beneficial interest in the covered securities themselves. That distinction is particularly salient because "[a] contract to purchase or sell securities is expressly defined by § 3(a) of the 1934 Act, 15 U.S.C. § 78c(a), as a purchase or sale of securities for the purposes of that Act," even when (due to one party's breach of the agreement) no securities ultimately change hands. *Blue Chip Stamps*, 421 U.S. at 750-751 (footnote omitted). The plaintiff in *IPM*, who had parted with money in exchange for a promise to place the funds in retirement trust accounts, had thus made (and had alleged misrepresentations closely connected to) an *actual* "purchase" of covered securities as the 1934 Act defines that term, even though PFA absconded with the money. In this case, by contrast, Stanford's misrepresentations about non-existent transactions in covered securities were integral to the fraud, but respondents did not contract to purchase any covered security.[5]

For similar reasons, the Second Circuit's decision in *Romano* v. *Kazacos*, 609 F.3d 512 (2010), does not conflict with the decision below. The plaintiffs in *Romano* alleged that Morgan Stanley had violated state law when it made misrepresentations that caused them to retire early, accept lump-sum retirement benefits, invest those benefits "in various [covered] securities through Morgan Stanley," and lose significant amounts of money. *Id.* at 515-517, 520-521, 523-524. The court noted that it had previously found SLUSA's "in connection with" requirement to be satisfied in cases where a plaintiff was allegedly "induced" to purchase the security that was the subject of a misrepresentation. *Id.* at 522 (quoting *Press* v. *Chemical Invest. Servs. Corp.*, 166 F.3d 529, 537 (2d Cir. 1999)). The court found that connection to be present in *Romano*, emphasizing the plaintiffs' assertion that "defendants fraudulently induced them to invest in securities with the expectation of achieving future returns that were not realized." *Id.* at 523; see *id.* at 524 (explaining that in this circumstance "both the misconduct complained of, and the harm incurred, rests on and arises from [covered] securities transactions"). As in *IPM*, the court in *Romano* thus addressed a situation at

[5] Some petitioners argue (*e.g.*, 12-88 Pet. Reply 6) that SLUSA preclusion applies here because some plaintiffs *sold* covered securities to raise the money to purchase CDs. But neither *IPM* nor any other court of appeals decision that petitioners cite analyzes that kind of claimed "connection." Thus, no conflict exists with respect to the Fifth Circuit's holding that "[c]onstruing SLUSA to depend on the source of funds where the defendant does not care leads to absurd results." Pet. App. 39a & n.7.

the core of SLUSA, namely a fraudulent scheme to induce investments in covered securities.

The decision below also does not conflict with the Sixth Circuit's decision in *Segal* v. *Fifth Third Bank*, 581 F.3d 305 (2009), cert. denied, 130 S. Ct. 3326 (2010), which likewise did not involve a multi-layered transaction. In *Segal*, a beneficiary of trust accounts alleged that the trustee had breached its fiduciary duties by "investing fiduciary assets in proprietary * * * mutual funds," which were covered securities, "rather than superior funds operated by * * * competitors." *Id.* at 308; see *id.* at 309. The court concluded that "[a]ll of Segal's counts—breach of fiduciary duty, unjust enrichment, breach of contract—revolve around [defendant's] decision to buy mutual fund shares. Segal's allegations do not merely 'coincide' with securities transactions; they depend on them." *Id.* at 310. The "depend[ence]" to which the court referred was one in which all of the fraud allegations centered around a single transaction in covered securities in which the plaintiff had a beneficial interest. That kind of dependence is not present in this case, where respondents neither acquired nor believed they were acquiring any beneficial interest in the covered securities to which Stanford's misrepresentations referred. See Pet. App. 37a (noting that respondents did not allege that "they deposited their money in the bank for the purpose of purchasing covered securities") (internal quotation marks omitted). In contending that the case would have come out differently under *Segal* (*e.g.*, 12-79 Pet. Reply 7), petitioners wrest the word "depend" from its context and apply it to a set of circumstances that the Sixth Circuit did not contemplate.

In sum, none of the decisions cited by petitioners is inconsistent with the Fifth Circuit's decision. To be sure, the courts of appeals have used "slightly different articulation[s]" in assessing SLUSA preclusion, Pet. App. 20a; see *id.* at 31a; *Romano*, 609 F.3d at 522—just as this Court has variously used the terms "touch[]" and "coincide" to describe the requisite connection between a misrepresentation and a securities transaction, *Dabit*, 547 U.S. at 85; *Bankers Life*, 404 U.S. at 12-13. But that variation does not mean that the courts of appeals have applied substantively different understandings of the "in connection with" requirement. And while the Fifth Circuit proffered some assessment of the language used by its sister circuits, the court also correctly noted that other court of appeals cases were not "factually analogous" to this one because they did not involve alleged fraud that "centered around the purchase or sale of an uncovered security," as to which the SLUSA preclusion analysis is "more complex." Pet. App. 20a.

b. Petitioners also contend that *IPM* and *Segal* conflict with the decision below on a different basis: their treatment of alleged misrepresentations that have no connection whatever with covered securities transactions. Petitioners assert (*e.g.*, 12-86 Pet. 23-25) that the Fifth Circuit diverged from other circuits in finding such misrepresentations relevant to the "in connection with" inquiry.

That assertion is mistaken. The Fifth Circuit's analysis of the "host of (mis)representations" before it was undertaken in the course of ascertaining whether the "in connection with" requirement was met at all—that is, whether the alleged fraud was sufficiently connected to the purchase or sale of covered securities. See Pet. App. 35a-37a. In contrast, the courts in *IPM* and *Segal* first ascertained that a sufficient connection existed to trigger SLUSA preclusion, and then addressed a distinct and analytically subsequent issue: whether an action can nevertheless go forward if it "premises liability on multiple factual theories," some of which do not involve "representations made 'in connection with the purchase or sale' of a security." *IPM*, 546 F.3d at 1350; see *Segal*, 581 F.3d at 311-312; see also, *e.g.*, *Proctor* v. *Vishay Intertech. Inc.*, 584 F.3d 1208, 1227 (9th Cir. 2009) ("SLUSA does not require the dismissal of non-precluded claims along with precluded claims."); cf. *Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 305 (3d Cir. 2005) ("[W]e need not decide whether a count-by-count analysis is appropriate in this case, because plaintiff has incorporated every allegation into every count in his complaint.").

Because the courts in *IPM* and *Segal* addressed allegations that lie in the heartland of SLUSA preclusion, those decisions do not conflict with the Fifth Circuit's ruling here. Misrepresentations inducing plaintiffs to invest in covered securities clearly meet the "in connection with" requirement, regardless of what other misrepresentations the defendants might have made. Because neither *IPM* nor *Segal* involved misrepresentations designed to induce investments in uncovered securities, the Eleventh and Sixth Circuits had no occasion to undertake (or reject) the analysis in which the Fifth Circuit engaged.

c. Finally, some petitioners argue that the decision below creates a circuit split relating to aiding and abetting liability. They contend that the Fifth Circuit rejected the rule applied in the Ninth and Eleventh Circuits, where aiding and abetting claims are always precluded if "the underlying fraud is SLUSA-covered." 12-79 Pet. 30 (citing *Proctor*, 584 F.3d at 1223, and *IPM*, 546 F.3d at 1351).

That contention rests on a misunderstanding of the decision below. The Fifth Circuit addressed aiding and abetting liability only after concluding that the claims against the primary violators were *not* precluded under SLUSA. The court did not suggest that the claims against the aiders and abettors could have gone forward if the claims against the primary violators had been barred.

To be sure, the court of appeals did examine the specific misrepresentations that the Proskauer Defendants were alleged to have made, to see if there was some independent basis for preclusion as to those defendants that did not apply to the primary violators. See Pet. App. 40a-41a. That analysis, however, is fully consistent with the rule that preclusion of claims against primary violators results in preclusion of claims against aiders and abettors as well. And the court's approach did not harm the Proskauer Defendants; it benefited them, by giving them a second opportunity to prove preclusion and thereby increasing the chances that SLUSA would result in dismissal of the claims against them.

3. This Court has already addressed the "in connection with" requirement on numerous occasions, both in construing SLUSA and in clarifying the scope of Section 10(b)'s substantive prohibition. See, *e.g.*, *Dabit*, 547 U.S. at 85; *Zandford*, 535 U.S. at 819; *O'Hagan*, 521 U.S. at 651, 658; *Bankers Life*, 404 U.S. at 8-9. The courts of appeals are applying the principles laid down in this Court's decisions, albeit with some "slight[]" differences in "articulation." Pet. App. 20a. The circuits' use of varying terminology does not evidence any significant substantive disuniformity. Rather, because the courts of appeals have applied SLUSA's "in connection with" requirement to fraudulent schemes having a variety of

asserted links to covered securities, the use of somewhat different phrasing in different cases is all but inevitable.

Review would be unwarranted in this case, moreover, even if the current body of appellate precedent suggested widespread confusion as to the proper construction of SLUSA's "in connection with" requirement.[6] Respondents alleged that the wrongdoers in this case had made false representations concerning SIB's fictitious holdings in SLUSA-covered securities, for the purpose of inducing respondents to invest in *un*covered securities. As we explain above, those misrepresentations were "in connection with the purchase or sale of a covered security" under an appropriately broad reading of SLUSA's preclusion provision. Nevertheless, respondents' allegations are significantly removed both from the core of SLUSA preclusion and from the types of allegations with which the courts of appeals have typically dealt. Indeed, petitioners rely on no other court of appeals decision applying SLUSA to misrepresentations about covered securities that were designed to induce investments in uncovered securities. This case therefore would be a poor vehicle for clarifying SLUSA's application to more usual fact patterns.[7]

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[6] Contrary to the contention of certain respondents (12-86 Opp. 6-10), there is no jurisdictional bar to this Court's consideration of the case. See *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947) (rejecting argument that "a decision of a Circuit Court of Appeals ordering remand of a case to a state court" is unreviewable on certiorari when "the mandate of that court has issued and the District Court has remanded the cause to the state court").

[7] The unusual nature of the allegations here also suggests that petitioners' fears about forum-shopping and unreviewability of future SLUSA cases (*e.g.*, 12-79 Pet. 25, 31; 12-88 Pet. 31) are overstated. The Fifth Circuit's decision seems unlikely to motivate plaintiffs in typical SLUSA-related cases to flock to courts within that circuit.

Indeed, if review were granted, this Court's decision could ultimately turn on even more idiosyncratic aspects of the record in this case. The misrepresentations that petitioners are alleged to have made did not refer specifically to securities listed on a regulated national exchange. Rather, respondents alleged misrepresentations to the effect that SIB held "a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." Pet. App. 8a. Because securities having those characteristics "typically qualify as SLUSA-covered securities," *id.* at 72a; see *id.* at 65a n.11, we believe that petitioners' alleged false statements are properly treated, for purposes of SLUSA preclusion, as implicit representations that SIB would invest the proceeds of the CD sales in securities listed on a regulated national exchange. But if the Court granted review and ultimately declined to draw that inference, its decision would be unlikely to provide any meaningful guidance for the resolution of other SLUSA disputes.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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