No. 12-86

In the Supreme Court of the United States

WILLIS OF COLORADO INCORPORATED, ET AL.,
PETITIONERS

v.

SAMUEL TROICE, ET AL.,
RESPONDENTS

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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.3(b), DRI—The Voice of the Defense Bar ("DRI") respectfully requests leave to file this *amicus curiae* brief in support of the Petitioners.

After the undersigned counsel provided the timely notice required by Supreme Court Rule 37(2)(a), counsel for the Petitioners, as well as counsel for Respondents Troice, Mendez, and Punga Punga, consented to the filing of this brief. Letters showing their consent are being transmitted with this Motion. Counsel for Respondents Roland, Giambrone, Bowden, Forbes, and Farr declined consent, requiring the filing of this motion.

DRI is uniquely well-situated to provide the Court with context for the important issues raised by the Petition and the dangers the Fifth Circuit's approach presents to U.S. capital markets, businesses, and third-party professional advisors like lawyers and auditors. As discussed further below, DRI and its members have extensive experience in defending private lawsuits under the federal securities laws and have an acute appreciation for the abuses that prompted Congress to take steps to rein in such lawsuits. DRI respectfully requests that its motion be granted and that the attached brief amicus curiae be included with the papers for consideration by the Court.

Respectfully submitted.

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AUGUST 2012

QUESTION PRESENTED

Whether a covered state law class action complaint that unquestionably alleges "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security nonetheless can escape the application of SLUSA by including other allegations that are farther removed from a covered securities transaction.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

Members of DRI—the Voice of the Defense Bar, an international organization of more than 22,000 attorneys involved in civil litigation defense—have wide experience in litigating securities class actions, and they understand how these actions can be abused. When this happens, it unnecessarily drives up the cost of doing business in the United States and reduces the competitiveness of U.S. capital markets. Congress and this Court have long been sensitive to this potential for abuse, and for that reason they have strictly limited both the kinds of securities claims that private citizens may bring and where and how they may bring them.

The Fifth Circuit's decision threatens to undo all this. By holding that the plaintiffs may proceed in state court on securities-related claims that would have been squarely precluded if they were brought under federal law, the panel below opened the door to the very same risks and abuses that this Court and Congress have worked for decades to avoid. At the same time, the panel widened the disagreement among the Circuits with regard to the scope of preclusion under the Securities Litigation Uniform Standards Act ("SLUSA"). This Court's intervention is warranted to resolve the conflict and ensure the lower courts' fidelity to the limits Congress and the Courts have placed on securities class actions.

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[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity other than DRI and its counsel has made a monetary contribution to the preparation or filing of this brief.

This issue is of particular concern to DRI, which has long been committed to making the civil justice system fairer, more efficient, and—when national issues like U.S. capital markets are involved—more consistent. To promote these objectives, DRI often participates as *amicus curiae* in cases before this Court that raise issues important to its members, their clients, and the judicial system at large.

STATEMENT OF THE CASE

When Congress enacted the Securities Acts of 1933 and 1934 in the wake of the disastrous stock market crash of 1929, it created an "extensive scheme of civil liability" governing the national securities markets. *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 171 (1994). Since then, these "two statutes have anchored federal regulation of vital elements of our economy." *Merrill Lynch* v. *Dabit,* 547 U.S. 71, 78 (2006). Consistent with the national character of the U.S. securities markets, until 1995 nearly all significant private securities litigation was brought under the Securities Acts and filed in federal court.

This began to change in the 1990s, when Congress, reacting to widespread abuses, passed the Private Securities Litigation Reform Act ("PSLRA") and imposed strict limits on private securities lawsuits. Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. § 78u-4; 15 U.S.C. § 78t(e). During the same period, this Court independently recognized that certain kinds of enforcement actions—notably those brought against defendants who allegedly aided or abetted securities fraud—were particularly prone to abuse and for that reason did not belong in the hands of private citizens unless Congress provided otherwise. See *Central*

Bank, 511 U.S. at 164; see also *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta,* 552 U.S. 148, 158, 163–64 (2008) (underscoring this limitation).

Predictably, the strict new PSLRA rules governing private lawsuits under federal law prompted an increase in securities-related lawsuits brought in state court under state law. So, in 1998, Congress passed another law—SLUSA—which precludes state law class action suits that involve misrepresentations "in connection with" the sale or purchase of a covered security. Pub. L. No. 105-353, 112 Stat. 3227, 15 U.S.C. § 78bb(f)(1).

This case is about the scope of SLUSA. In particular, it concerns whether the key phrase "in connection with" is broad enough to encompass state law actions like the ones here, which involved claims against third parties who provided services to—or otherwise did business with—an entity that made misrepresentations in connection with the purchase or sale of securities.

This case arises out of the collapse of a fraudulent scheme perpetrated by Allen H. Stanford and his affiliated companies, including Stanford International Bank ("SIB"), which issued worthless certificates of deposit that were allegedly backed by highly liquid securities. Unable to recover against the primary wrongdoers, the plaintiffs have turned their attention to a series of secondary actors, raising claims that would face significant obstacles in federal court. There are three basic types of claims at issue here: first, claims against an insurance company for its assurances that SIB had purchased insurance; second, claims against SEI Investment Company, which provided fund management software to a fund that in-

vested in the worthless SIB certificates of deposit; and finally, claims against Stanford's attorneys for allegedly misleading the Securities and Exchange Commission ("SEC") regarding its ability to regulate SIB.

The district court held that SLUSA precluded these claims because the underlying fraud unquestionably involved the purchase or sale of covered securities. The Fifth Circuit disagreed and, purporting to apply a test from the Ninth Circuit, found that the three types of claims in this case were only tangentially related to the "purchase or sale of a security," and thus fell outside of SLUSA's scope.

SUMMARY OF THE ARGUMENT

The decision below would seriously undermine SLUSA, which itself was enacted to keep the PSLRA reforms from becoming a dead letter. As this Court has already held, SLUSA's key phrase—"in connection with"—should be broadly interpreted to accomplish Congress's objectives. So construed, it is clear that the Fifth Circuit erred when it held that SLUSA did not apply here and, in doing so, furthered a significant dispute among the Circuits about SLUSA's reach.

The Fifth Circuit's decision is inconsistent not only with the statutory language but also with this Court's and Congress's view that the limits on securities class actions must be carefully policed, and that aiding and abetting claims, which are particularly prone to abuse, should be brought by the SEC and not by private parties. If allowed to stand, the decision below will create a gaping loophole in the securities class action reforms and expose the U.S. capital mar-

kets to new and dangerous levels of liability. Moreover, this risk is unnecessary, because Congress has already given the SEC all the enforcement powers it needs to investigate those who lie to the Commission or aid another in committing securities fraud. To safeguard Congress's PSLRA reforms and the limits this Court has placed on private actions under the securities laws—and to ensure respect for the important policies served by SLUSA—this Court should grant the petition for certiorari and reverse the decision of the Fifth Circuit.

ARGUMENT

I. The plain language of SLUSA requires a broad reading of "in connection with."

SLUSA limits the ability of private citizens to bring "covered class actions based upon the statutory or common law of any state" in cases alleging:

> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed 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).[2] "A 'covered class action' is a lawsuit in which damages are sought on behalf of

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[2] SLUSA amended the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933 Act), and the Securities Exchange Act of 1934 , Pub. L. No. 73-298, 48 Stat. 881 (1934 Act) in "substantially identical" ways. *Dabit,* 547 U.S. at 82 n. 6. Because they are more relevant here, we quote the amendments to the 1934 Act. See *ibid.*

more than 50 people," and a "covered security" is "one traded nationally and listed on a regulated national exchange."[3] *Dabit*, 547 U.S. at 83.

While section B applies to cases alleging that "the defendant" used a "deceptive or manipulative device or contrivance," the section at issue in this case—section A—applies SLUSA preclusion to *any* case alleging a "misrepresentation or omission of material fact in connection with the purchase or sale of a covered security," without regard to the identity of either the person who made the misrepresentation or the person who purchased or sold the covered security. 15 U.S.C. § 78bb(f)(1).

As this Court has recognized, SLUSA's use of "in connection with" did not occur in a vacuum. See *Dabit*, 547 U.S. at 84–85. The same phrase appears in section 10 of the 1934 Act, and in that context, this Court has interpreted it broadly for over forty years. *Id.* at 85 ("[W]hen this Court *has* sought to give meaning to the phrase ['in connection with'] in the context of § 10(b) and Rule 10b-5, it has espoused a broad interpretation."). An interpretation that places "'broad discretionary powers' in the regulatory agency" has "been found practically essential" because "practices 'constantly vary and * * * practices legitimate for some purposes may be turned to illegitimate and fraudulent means.'" *Superintendent of Ins. of State of N.Y.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); see, *e.g., Sec. Exch. Comm'n* v. *Zandford,*

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[3] Respondents' lawsuits met the statutory definition of a "covered class action" once they were consolidated by the district court below. See Willis Pet. at 12 (citing 15 U.S.C. § 78bb(f)(5)(B)(ii)) (discussing the "grouping" of actions).

535 U.S. 813, 819 (2002) (noting that "[i]n its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security'"). After surveying the judicial record, *Dabit* concluded that Congress intended to "incorporate" this "broad construction" when it "imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision." 547 U.S. at 85.

What *Dabit* did *not* hold, however, was that the scope of activity encompassed by the phrase "in connection with" in SLUSA was limited to acts that could form the basis for a private securities lawsuit under section 10(b) of the 1934 Act. See *id.* at 84. The *Dabit* respondents made this argument, asserting that SLUSA did not reach their claims because they were mere holders of securities who lacked standing to bring a private securities action under federal law. See *Dabit,* 547 U.S. at 84. But this Court rejected the argument that "in connection with" must be "read narrowly to encompass (and therefore pre-empt) only those actions in which the purchaser-seller requirement of *Blue Chip Stamps* is met." *Id.* at 84–85. The Court held instead that "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Ibid.* In reaching this holding, the Court reasoned that "[a] narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose," which was "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the [PSLRA's] objectives." *Id.* at 86.

Thus, following *Dabit,* a lawsuit that alleges the existence of fraud that "'coincides' with a securities transaction" by either "the plaintiff or by someone else," falls within SLUSA's scope. *Ibid.* Here, for example, the question was whether a lawsuit over a deceptive scheme to sell worthless certificates of deposit allegedly backed by covered securities involved "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). Under SLUSA's plain language and the guidance provided in *Dabit*, the answer is yes. And the Fifth Circuit erred in reaching the opposite conclusion.

II. Allowing plaintiffs to escape SLUSA by suing remotely connected third parties would frustrate the considered policies of Congress.

If it is allowed to stand, moreover, the Fifth Circuit's approach to SLUSA preclusion will frustrate not only the plain language of the Act but also the important policies that underlay its enactment. Among other things, the Fifth Circuit's reading would allow class action plaintiffs to assert aiding and abetting claims like the ones in this case in state court, even though such claims would clearly be barred under federal law. *Stoneridge,* 552 U.S. at 162–63. In its experience, DRI believes that the consequences of such a rule would be grave—and that they are precisely the kinds of consequences that motivated Congress to adopt SLUSA in the first place.

A. This Court and Congress have carefully circumscribed securities class actions to prevent abusive practices that expose U.S. capital markets to unacceptable risks.

As this Court has noted, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit,* 547 U.S. at 78. Since their enactment in the 1930s, the Securities Acts have "anchored" the federal regulation of these "vital elements of our economy." *Ibid*. Accordingly, this Court has adopted a "broad interpretation" of the SEC's enforcement powers under Section 10(b). *Id.* at 85.

By contrast, however, this Court has taken a narrow approach to the judicially implied private right of action. See, *e.g., Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 748–49 (limitations on standing); *Central Bank*, 511 U.S. at 179–80 (limitations on aiding and abetting liability where no fraud is alleged); *Stoneridge,* 552 U.S. at 165–66 (limitations on aiding and abetting liability where fraud is alleged). And when Congress passed the PSLRA in 1994, it followed the same cautious, federally oriented approach by (1) adding new limits on the private right of action, and (2) expanding and clarifying the scope of the SEC's authority to protect the integrity of the national securities markets.

There is good reason for such caution. In *Central Bank*, this Court recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompa-

nies litigation in general."[4] 511 U.S. at 188–89 (citing *Blue Chip Stamps,* 421 U.S. at 739; *Virginia Bankshares,* 501 U.S. at 1105; S. Rep. No. 73-792, at 21 (1934) (attorney's fee provision is protection against strike suits)). That is in part because "in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success," for "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps*, 421 U.S. at 740. And the House Report on the PSLRA documented the "ways in which the class-action device was being used to injure 'the entire U.S. economy.'" *Dabit,* 547 U.S. at 81 (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). The Report observed 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 recent years," and that "these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Ibid.* (internal quotations omitted).

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[4] When evaluating attempts to extend the scope of private securities enforcement actions, this Court has long "considered [it] appropriate to examine" the "practical consequences of [such] an expansion." *Stoneridge,* 552 U.S. at 163 (citing *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U.S. 1083, 1104–05 (1991); *Blue Chip Stamps,* 421 U.S., at 737).

The PSLRA responded to these abuses in Title I, which is captioned "Reduction of Abusive Litigation." Among other things, Title I limits recoverable damages, imposes new restrictions on the selection of (and compensation for) lead plaintiffs in a class action, authorizes a stay of discovery pending resolution of any motion to dismiss; and imposes heightened pleading standards. *Id.* at 81–82 (citing 15 U.S.C. § 78u-4 and *Dura Pharmaceuticals, Inc.* v. *Broudo,* 544 U.S. 336 (2005)). In short, as this Court acknowledged in *Dabit*, Congress's "effort to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits placed special burdens on plaintiffs seeking to bring federal securities fraud class actions." *Ibid.*

To avoid these new burdens, the plaintiffs' bar turned its attention to state court. The number of state securities class actions filed in California alone increased fivefold in the first six months of 1996, following the enactment of the PSLRA. H.R. Rep. No. 105-640, at 10 (1998); see also SEC, OFFICE OF GENERAL COUNSEL, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at 84 (1997) (noting the increase in state securities class actions and observing that this "may reflect a migration of weaker cases to state court"); H.R. Rep. No. 105-803, at 14–15 (1998) (Conf. Rep.) (stating that plaintiffs' attorneys were attempting to "circumvent the [PSLRA's] provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available").

This shift is no surprise. "'Prior to the passage of the [PSLRA], there was essentially no significant securities class action litigation brought in State court.'" *Dabit,* 547 U.S. at 88 (quoting H.R. Rep. No. 105-803, at 14 (1998) (Conf. Rep.). This was true even though state securities laws permitted private citizens to bring suit on theories that were not allowed under federal law. *Ibid.* ("[W]hile state-law holder claims were theoretically available both before and after the decision in *Blue Chip Stamps,* the actual assertion of such claims by way of class action was virtually unheard of before SLUSA was enacted; respondent and his *amici* have identified only *one* pre-SLUSA case involving a state-law class action asserting holder claims."). "To stem this 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA,] * * * Congress enacted SLUSA." *Id.* at 82 (quoting SLUSA §§ 2(2), (5), 112 Stat. 3227).

SLUSA's legislative history reflects Congress's considered judgment that "lawsuits alleging violations that involve securities that are offered nationally belong in Federal court." 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998); see also H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.) ("this legislation establishes uniform national rules for securities class action litigation involving our national capital markets"). To accomplish this objective, SLUSA targeted the private enforcement mechanism that Congress identified as most prone to abuse: class actions. To prevent SLUSA's substantive objectives from being frustrated through artful pleading, Congress created a broad and flexible definition of "covered class ac-

tions" and freely permitted removal to federal court.[5] *Dabit*, 547 U.S. at 83 nn. 6, 8 (quoting SLUSA, 112 Stat. 3230, 3232 (codified at 15 U.S.C. § 78bb(f)(2), (5)). And, as we have already seen, when it defined the kinds of allegations covered by the law, Congress used the "in connection with" language that has been

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[5] The statute states:

> The term 'covered class action' means—
>
> (i) any single lawsuit in which—
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—
>
> (I) damages are sought on behalf of more than 50 persons; and
>
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

Dabit, 547 U.S. at 83 n.8 (quoting SLUSA, 112 Stat. 3232 (codified at 15 U.S.C. § 78bb(f)(5)(B)).

broadly construed by this Court for over forty years. SLUSA, 112 Stat. 3230 (codified as amended at 15 U.S.C. § 78bb(f)(1)); see *supra* at 9. Overall, then, SLUSA reflects Congress's judgment that private securities enforcement must be carefully cabined and that the category of private lawsuits that presents the greatest risk of harming the U.S. securities markets—class actions—should be brought only under federal law.

Congress's reforms have had a positive impact: in 2011, the overall number of securities class action settlements declined by 30% to the lowest number since 1999, while the total settlement value—$3.4 billion—represented a 17% increase from prior years, largely due to the participation of institutional plaintiffs like pension funds.[6] Since small settlements are often regarded as a sign of nuisance suits, and because the participation of large institutional investors like pension funds (thought to be a bulwark against strike suits) was one of the results Congress sought to achieve in the PSLRA, these trends highlight the enduring nature of Congress's reforms. See Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727, 742–43 (1995) (noting that settlements of less than $2 million suggested that the suits held only a nuisance value); 15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B) (creating a rebuttable presumption that the class member with the largest financial interest is the most adequate lead plaintiff); H.R. Rep. No. 104-50, at 34 (1995) (observing that this presumption is

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[6] PRICEWATERHOUSECOOPERS, THE EVER-CHANGING LANDSCAPE OF LITIGATION COMES FULL CIRCLE: 2011 SECURITIES LITIGATION STUDY 22–23 (2012), *available at* http://10b5.pwc.com/PDF/2011_securities_litigation_study_14_interactive.PDF.

intended to "encourage institutional investors to take a more active role in securities class action lawsuits."). By opening the door to securities-related lawsuits in state court, the Fifth Circuit's decision threatens to undo much of what Congress accomplished in the PSLRA and SLUSA.

B. For over twenty years, this Court and Congress have likewise recognized that private enforcement of aiding and abetting violations is potentially harmful to U.S. capital markets.

Securities class actions are not the only kind of private securities lawsuits that have raised red flags for Congress and this Court. In a series of decisions over the past thirty-seven years, this Court has determined that at least two categories of substantive claims—claims brought by holders of securities, and claims alleging liability for aiding and abetting securities fraud—are too uncertain and potentially abusive to be enforced by private parties. See *Blue Chip Stamps*, 421 U.S. at 742–43; *Central Bank*, 511 U.S. at 167. In *Dabit* this Court concluded that SLUSA was intended to cover holder claims, but in the decision below, the Fifth Circuit wrongly concluded that SLUSA did not extend to aider and abettor actions. The Fifth Circuit's decision is impossible to reconcile with this Court's judgment—shared by Congress—that such claims are not appropriate for private enforcement.

This Court first reached this conclusion in *Central Bank*. "Since 1966, numerous lower courts" had held that private litigants could sue those who aided and abetted another actor who violated the securities laws. *Central Bank*, 511 U.S. at 170. Squarely re-

viewing the issue for the first time, the Court concluded that private civil liability for aiding and abetting was not supported by the text of section 10(b). *Id.* at 177–78.

In reaching this result, the Court went out of its way to observe that "[s]econdary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Id.* at 188. Securities litigation is "an area that demands certainty and predictability," but "[b]ecause 'the rules for determining aiding and abetting liability are unclear, decisions are likely to be made on an ad hoc basis, offering little predictive value to those who provide services to participants in the securities business.'" *Ibid.* (internal quotations and citations omitted.). The Court concluded that "'[s]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5'" is not a "'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Ibid.* (quoting *Blue Chip Stamps,* 421 U.S. at 755, 795).

The Court identified many of the same hazards in aiding and abetting liability that led Congress to enact PSLRA's limits on securities class actions the following year. "Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Ibid.* "This uncertainty and excessive litigation can have ripple effects" on "newer and smaller companies" that "may find it difficult to obtain advice from professionals"—like

lawyers and auditors—who may fear "that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." *Ibid.* Perversely, these "increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Ibid.* (citing Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 948–66 (1993)). Finally, the Court acknowledged that even meritless suits imposed a significant financial burden on secondary actors, noting that "[l]itigation under 10b-5 * * * requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements," which in the case of major accounting firms resulted in the expenditure of "$8 in legal fees for every $1 paid in claims." *Ibid.* (citing 138 Cong. Rec. S12605 (Aug. 12, 1992) (remarks of Sen. Sanford).

Fourteen years later, in *Stoneridge,* the Court rejected an attempt to resurrect private aider and abettor liability and affirmed that Congress, in a "specific response to *Central Bank*," had subsequently "amended the securities laws to provide for limited coverage of aiders and abettors * * * in actions brought by the SEC *but not by private parties*." *Stoneridge,* 552 U.S. at 162 (citing 15 U.S.C. § 78t(e)) (emphasis added). Recognizing private aider and abettor liability "would undermine Congress's determination that this class of defendants should be pursued by the SEC and not by private litigants," in violation of the principle that "[t]he express provision of

one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* at 162–63 (quoting *Alexander* v. *Sandoval,* 532 U.S. 275, 290 (2001)).

Once again, the *Stoneridge* court went out of its way to identify the "practical consequences" of a contrary rule, noting that private civil liability for aiding and abetting securities fraud "would expose a new class of defendants" such as lawyers, auditors, and otherwise innocent business partners to the risk of "extensive discovery and the potential for uncertainty and disruption," which "allow[s] plaintiffs with weak claims to extort settlements from innocent companies." *Ibid.* These secondary actors would, in turn, likely pass their skyrocketing legal costs on to their clients and business partners, "rais[ing] the cost of being a publicly traded company under our law and shift[ing] securities offerings away from domestic capital markets." *Ibid.*

This Court's concerns about the negative effects of aider and abettor liability on the global competitiveness of the U.S. capital markets are as valid today as they were in 2005. One report commissioned by Senator Charles Schumer and New York City Mayor Michael Bloomberg found that "the high legal cost of doing business in the US financial services industry is of real concern to corporate executives," that "propensity toward legal action was the predominant problem," and that 85% of CEOs believed that London was preferable to New York in this regard. MCKINSEY & COMPANY, SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP 75

(2007).[7] And in a survey of 334 senior executives of overseas companies, one out of three companies that had considered going public in the U.S. indicated that "litigation [was] an 'extremely important' factor in their decision." THE FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY 6–8 (2007).[8] Perhaps more tellingly, the same survey showed that "nine out of 10 companies who de-listed from a U.S. exchange" from 2003 to 2007 "said that the litigation environment played some role in that decision." *Ibid.* In short, the U.S. securities markets are already losing a competitive edge because of the high costs of litigation in this country. The Fifth Circuit's decision only exacerbates this already-serious problem.

C. Allowing plaintiffs to escape SLUSA by suing remotely connected third parties in state court would frustrate Congress's intent and expose U.S. capital markets to all the risk of harm recognized in *Central Bank* and *Stoneridge*.

The Fifth Circuit's holding that the aiding and abetting claims here can proceed in state court would open the door to all of the risks and harms identified by this Court in *Central Bank* and *Stoneridge*. These include the extension of liability to auditors and lawyers who may be forced to pass their skyrocketing legal costs on to clients and thus raise the cost of participating in the U.S. capital markets. Based on its members' experience in representing lawyers and ac-

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[7] *Available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[8] *Available at* http://www.financialservicesforum.org/images/stories/20071211_global_capital__markets_survey.pdf.

counting firms that have been sued in securities class actions, DRI is well aware of the devastating effect that even meritless lawsuits can have on these professionals and the businesses they serve. Allowing such suits to proceed would frustrate Congress's judgment that these types of claims are best investigated by the SEC, not private parties. See 15 U.S.C. § 78t(e). It would also frustrate Congress's main goal in adopting SLUSA—namely, to keep securities class actions in federal court and subject to the strict limits imposed under the PSLRA and this Court's cases.

As this Court stated when considering the analogous question of whether SLUSA precluded holder claims not available under federal securities law, "[a] narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]." *Dabit*, 547 U.S. at 86 (quoting SLUSA § 2(5), 112 Stat. 3227). SLUSA's congressional supporters regarded "differing federal and state standards of liability for nationally-traded securities" as a "danger" to be avoided, S. Rep. No. 105-182, at 3 (1998), and viewed circumventing the PSLRA by filing in state court as a serious problem. See H.R. Rep. No. 105-640, at 10 (1998). SLUSA was Congress's "solution" to this problem, and its congressional supporters believed that they were acting to "make Federal court the exclusive venue for securities fraud class action litigation." *Ibid.* Against this background, "[i]t would be odd, to say the least, if SLUSA exempted [a] particularly troublesome subset of class actions"—aiding and abetting actions—"from its preemptive sweep." *Dabit*, 547 U.S. at 86–87 & n. 12.

For this reason, too, the Court should grant review and reverse the decision below.

III. The risks created by lawsuits like the ones at issue here are unnecessary because state and federal agencies already possess broad authority to investigate and prosecute aiding and abetting violations.

The allegations here show the hazards of interpreting SLUSA narrowly: one of the underlying complaints alleges that Stanford's lawyers aided and abetted securities fraud by "allegedly misrepresent[ing] *to the SEC* the Commission's ability to exercise its oversight over Stanford and SIB," and "telling *the SEC* that it could not investigate the operations of Stanford and SIB." Pet. App. at 42 (emphasis added). There is simply nothing in the text or history of SLUSA to indicate that Congress intended to permit a private party to bring a state court class action against a secondary actor based on alleged misrepresentations made to the SEC, which already has broad powers to discipline attorneys who fail to disclose material violations of the securities laws when practicing before the Commission. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 307, 15 U.S.C. § 7245 (2006); 17 C.F.R. § 205.3 (2011).[9] Such lawsuits are an affront to the regulatory system Congress created to police those very abuses. See, *e.g., Buckman* v. *Plaintiffs' Legal Committee,* 531 U.S.

[9] See also Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01 (Feb. 6, 2003), *available at* http://www.sec.gov/rules/final/33-8185.htm.

341, 347–48 (holding state claims based on alleged fraud on the FDA preempted).

Moreover, holding that SLUSA precludes aiding and abetting class actions will not leave other secondary actors who aid securities fraud unpunished. As one independent report concluded, "[t]he United States has the toughest administrative enforcement of securities law in the world." COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 74 (2006).[10] And Congress gave the SEC express authority to pursue aiders and abettors in the PSLRA (15 U.S.C. § 78t(e)), which the SEC has used to prosecute lawyers who knowingly helped their clients to commit securities fraud. See*, e.g.,* SEC Litigation Release No. 22352, SEC Charges Attorney and Clients in Scheme to Unlawfully Sell Billions of Penny-Stock Shares (May 1, 2012) (noting that the SEC's complaint charged an attorney with violating, or aiding and abetting a violation of, Section 5 of the Securities Act).[11]

Writing in 2008, this Court observed that the SEC's civil and criminal enforcement power for secondary actors "is not toothless." *Stoneridge,* 552 U.S. at 166. This is even more true today than it was then, with the significant expansion of the SEC's enforcement authority under the recent Dodd-Frank Act. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-

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[10] *Available at* http://www.law.du.edu/images/uploads/corporate-governance/empirical-committee-capital-markets-regulation.pdf.

[11] *Available at* http://www.sec.gov/litigation/litreleases/2012/lr22352.htm.

203, § 922(a), 124 Stat 1841 (2010); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011).[12] In 2011, the SEC's Division of Enforcement achieved "a record performance," filing 735 enforcement actions, opening 933 investigations, and obtaining $2.8 billion in penalties and disgorgement. SEC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2011, at 12 (2011).[13] And the SEC's new Office of the Whistleblower, created under Dodd-Frank, received 334 whistleblower tips in the first two months of its full-fledged operation. SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2011, at 5 (2011).[14] All of this federal enforcement authority is, of course, in addition to the numerous "state securities laws [that] permit state authorities to seek fines and restitution from aiders and abettors." *Stoneridge,* 552 U.S. at 166 (citing Del. Code Ann., Tit. 6, § 7325 (2005)).

In short, the reforms in the PSLRA, SLUSA, Sarbanes-Oxley, and Dodd-Frank represent Congress's considered judgment that government agencies, not private class action plaintiffs, are the appropriate en-

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[12] The SEC's Director of Enforcement has noted that the Dodd-Frank whistleblower provisions may play a particularly important role in deterring aiding and abetting violations because by making it less likely that material violations will remain hidden indefinitely, they provide an added incentive for secondary actors like attorneys and auditors to thoroughly investigate any fully disclose any suspicions of fraud. See Robert S. Khuzami, Remarks to Criminal Law Group of the UJA—Federation of New York (June 1, 2011), *available at* http://www.sec.gov /news/speech/2011/spch060111rk.htm.

[13] *Avalable at* http://www.sec.gov/about/secpar/secpar2011.pdf.

[14] *Available at* http://www.sec.gov/about/offices/owb/whistle blower-annual-report-2011.pdf.

forcers for the kind of securities-related fraud alleged in this case. This Court's intervention is necessary to ensure the federal courts' respect for that judgment.

CONCLUSION

The Fifth Circuit's decision below is inconsistent with the statutory language. It is also unwise and unnecessary. For these and the other reasons discussed in the petition for certiorari, this Court should grant review and reverse the decision below.

Respectfully submitted.

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AUGUST 2012