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*

WILLIS OF COLORADO INCORPORATED, ET AL., *PETITIONERS*

v.

SAMUEL TROICE, ET AL., *RESPONDENTS*

PROSKAUER ROSE, LLP, *PETITIONER*

v.

SAMUEL TROICE, ET AL., *RESPONDENTS*

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

BRIEF *AMICUS CURIAE* OF DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

LINDA T. COBERLY
MARISSA S. RONK
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-8768
lcoberly@winston.com
mronk@winston.com

GENE C. SCHAERR
STEFFEN N. JOHNSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com
sjohnson@winston.com

MARY MASSARON ROSS*
President of DRI
**Counsel of Record*
55 West Monroe
Suite 2000
Chicago, Illinois 60603
(312) 795-1101
mmassaron@plunkettcooney.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE.................................. 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. The Fifth Circuit's approach is inconsistent with the plain language of SLUSA, as interpreted by this Court. 6

II. The Fifth Circuit's approach would frustrate the important limitations this Court and Congress have placed on private securities suits, including on private claims for aiding and abetting. 10

   A. This Court and Congress have carefully circumscribed securities class actions to prevent abusive practices that expose U.S. markets to unacceptable risks. 10

   B. Private lawsuits for aiding and abetting securities-related misstatements—which would clearly increase under the Fifth Circuit's approach—are particularly harmful to U.S. capital markets. 16

III. The risks and costs created by lawsuits like the ones at issue here are unnecessary because state and federal agencies already possess broad authority to prosecute both primary and secondary liability for securities-related misrepresentations. 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. *Sandoval,*
532 U.S. 275 (2001) 18

Blue Chip Stamps v. *Manor Drug Stores,*
421 U.S. 723 (1975) 7, 9, 10, 12, 15, 16

Buckman v. *Plaintiffs' Legal Committee,*
531 U.S. 341 (2001) 21, 22

Central Bank of Denver v.
First Interstate Bank of Denver,
511 U.S. 164 (1994) ....*passim*

Dura Pharmaceuticals, Inc. v. *Broudo,*
544 U.S. 336 (2005) 11

Merrill Lynch, Pierce, Fenner & Smith Inc. v.
Dabit, 547 U.S. 71 (2006).............................*passim*

Securities & Exchange Commission v. *Zandford,*
535 U.S. 813 (2002) 6, 7

Roland v. *Green*,
675 F.3d. 503 (5th Cir. 2012) 22

Stoneridge Investment Partners, LLC v.
Scientific-Atlanta,
552 U.S. 148 (2008) ....*passim*

Superintendent of Insurance of State of New York v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) 6

Virginia Bankshares, Inc. v. *Sandberg,* 501 U.S. 1083 (1991) 10

STATUTES

15 U.S.C. § 77z-1(a)(3)(B) 14

15 U.S.C. § 78bb(f)(1)................................3, 5, 6, 8, 14

15 U.S.C. § 78bb(f)(2).. 13

15 U.S.C. § 78bb(f)(5).. 6, 13

15 U.S.C. § 78t(e) 2, 17, 20, 22

15 U.S.C. § 78u-4 .... 2, 14

Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat 1376 *et seq.* 22, 23

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 *et seq.* .....*passim*

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 *et seq.*......................... 21, 23

Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 *et seq.*..2, 5, 6, 7

Securities Exchange Act of 1934, Pub. L. No. 73-298, 48 Stat. 881 *et seq.* 2, 5

Securities Litigation Uniform Standards Act,
Pub. L. No. 105-353, 112 Stat. 3227. ....*passim*

Del. Code Ann., Tit. 6, § 7325 (2005) 23

OTHER AUTHORITIES

17 C.F.R. § 205.3 (2011)... 21

SEC Rule 10b-5,
17 C.F.R. § 240.10b-5 (2005) 6, 9, 16, 17

Securities Whistleblower Incentives and Protections,
76 Fed. Reg. 34,300 (June 13, 2011)............. 22, 23

Implementation of Standards of Professional
Conduct for Attorneys, 68 Fed. Reg. 6296-01
(Feb. 6, 2003) 21

S. Rep. No. 73-792 (1934) 10

S. Rep. No. 105-182 (1998) 20

H.R. Rep. No. 104-369 (1995)............................. 14, 15

H.R. Rep. No. 105-640 (1998)............................. 11, 20

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) 10

H.R. Rep. No. 105-803 (1998) (Conf. Rep.) 11, 12

138 Cong. Rec. S12605 (Aug. 12, 1992).................... 17

144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998)..... 12

COMMITTEE ON CAPITAL MARKETS REGULATION,
INTERIM REPORT (2006) 22

THE FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY (2007) 19

Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727 (1995).. 14

Robert S. Khuzami, Remarks to Criminal Law Group of the UJA-Federation of New York (June 1, 2011) 23

MCKINSEY & COMPANY, SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP (2007) 18, 19

PRICEWATERHOUSECOOPERS, THE EVER-CHANGING LANDSCAPE OF LITIGATION COMES FULL CIRCLE: 2011 SECURITIES LITIGATION STUDY (2012) 14

SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2011 (2011) 23

SEC Litigation Release No. 22352, SEC Charges Attorney and Clients in Scheme to Unlawfully Sell Billions of Penny-Stock Shares (May 1, 2012) 22

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 (1997) 11

SEC, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2011 (2011)..................................... 23

Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945 (1993) 17

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[*]

Members of DRI—the Voice of the Defense Bar have extensive experience in litigating securities class actions, and they understand how these actions can be abused. When it occurs, this abuse 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 the potential for abuse in this area. For that reason, they have strictly limited both the kinds of securities claims that private plaintiffs may bring and where and how they may bring them. Primary responsibility for securities law enforcement thus remains with the Securities Exchange Commission ("SEC") and the Justice Department, which do not operate with the same profit incentives as the private plaintiffs' bar.

To ensure the efficacy of its reforms in this area, Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA"), which prevents parties from evading the federal limitations on private lawsuits by resorting to state law. SLUSA provides 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

---

[*] 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. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk of Court.

private party alleging * * * a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)&(1)(A)(2006). Under SLUSA, then, such lawsuits may proceed only in federal court, subject to the limitations imposed by federal law.

The decision under review threatens to roll back these reforms by adopting an unduly restrictive view of SLUSA's "in connection with" requirement. The Fifth Circuit concluded that even if a case *does* "alleg[e] * * * a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" (*id.*), it still may not meet the "in connection with" requirement if it alleges other misstatements as well. In other words, the Fifth Circuit effectively held that a state law class action is precluded only if it *predominantly* concerns a securities-related misrepresentation or omission.

SLUSA itself contains no such requirement—and inserting it now would open the door to the very same risks and abuses that this Court and Congress have worked for decades to avoid. Among other things, the Fifth Circuit's approach would pave the way for expanded state-law litigation against law firms, auditors, and other third-party professional services firms for aiding and abetting misstatements by their clients. These kinds of lawsuits—which often attempt to shift the entire cost of an investment-related fraud to a third party—are fraught with risk and impose costs that are inevitably passed on to direct participants in U.S. capital markets. Indeed, that is precisely why this Court has barred such private lawsuits as a matter of federal law.

This issue is of particular concern to DRI, an international organization of more than 22,000 attorneys involved in civil litigation defense. DRI 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 that raise issues important to its members, their clients, and the judicial system at large. This is such a case.

DRI urges this Court to reverse the decision of the Fifth Circuit and adopt a reading of SLUSA that is more faithful to its language and design.

STATEMENT OF THE CASE

1. 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)(1995). 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 Inv. 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 under state law. So, in 1998, Congress passed another law—SLUSA—which precludes state law class action suits that allege a misrepresentation "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).

2. This case arises out of the collapse of a fraudulent scheme perpetrated by R. Allen 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. The suits asserted three basic types of claims: 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 invested in the worthless SIB certificates of deposit; and finally, claims against Stanford's attorneys for allegedly misleading the 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," in large part because they also alleged misrepresentations that did *not* reference any investment in covered securities.

SUMMARY OF THE ARGUMENT

The decision below would seriously undermine SLUSA, which itself was enacted to keep federal securities litigation reform 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.

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 third-party 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 markets to new and dangerous levels of liability. Moreover, this risk is unnecessary, because Congress has already given the SEC all the enforcement power 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 reverse the decision of the Fifth Circuit.

ARGUMENT

I. The Fifth Circuit's approach is inconsistent with the plain language of SLUSA, as interpreted by this Court.

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).[1] "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people," and "[a] 'covered security'" is "one traded nationally and listed on a regulated national exchange."[2] *Dabit*, 547 U.S. at 83.

---

[1] 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.*

[2] Respondents' lawsuits met the statutory definition of a "covered class action" once they were consolidated by the district

While section B applies to cases alleging that "the defendant" used a "manipulative or deceptive 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 more than 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,* 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"

---

court below. See Willis Pet. at 12 (citing 15 U.S.C. § 78bb(f)(5)(B)(ii)) (discussing the "grouping" of actions).

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 for which a private plaintiff could recover in federal court. 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 *id.* But this Court rejected the argument that "in connection with" must be "read narrowly to encompass (and therefore preempt) 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, the plaintiffs had alleged that they invested in the Stanford scheme in part because of representations that the CDs would be backed by covered securities. Under SLUSA's plain language and the guid-

ance provided in *Dabit*, that allegation alone should have been enough to trigger SLUSA preclusion.

But the Fifth Circuit held to the contrary—largely because the lawsuit also included *other* alleged misrepresentations. The plaintiffs alleged that the defendants also falsely represented that the CDs were a "safe and secure" investment with a high level of liquidity and consistently high rates of return. According to the Fifth Circuit, "[t]hat the CDs were marketed with some vague references" about the nature of the CDs' underlying investments "seems tangential" to the schemes allegedly advanced by the defendants.

The Fifth Circuit's approach improperly imports a new requirement for SLUSA preclusion—a requirement that the allegations about representations "in connection with" covered securities *predominate* over any other allegations in the complaint. This requirement is not reflected in the statutory text—and it would enable plaintiffs to evade preclusion through artful pleading. Moreover, as discussed further below, the Fifth Circuit's approach would frustrate the important policies that underlay SLUSA's enactment. For all these reasons, this Court should decline to adopt the analysis suggested by the Fifth Circuit.

II. The Fifth Circuit's approach would frustrate the important limitations this Court and Congress have placed on private securities suits, including on private claims for aiding and abetting.

Among other things, the Fifth Circuit's reading would allow class action plaintiffs to assert aiding and abetting claims like the ones in this litigation 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. 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, 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 1995, 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 accompanies litigation in general."[3] 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 de-

---

[3] 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).

vice 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).

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 Pharmals., 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. In the first six months of 1996, following the enactment of the PSLRA, the number of state securities class actions filed in California alone increased fivefold. 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) (statement of Rep. Bliley); 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 actions" and freely permitted removal to federal court.[4] *Dabit*, 547 U.S. at 83 nn. 6, 8

---

[4] 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

(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 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 thirty percent to the lowest number since 1999, while the total settlement value—$3.4 billion—represented a seventeen percent increase from prior years, largely due to the participation of institutional plaintiffs like pension funds.[5]

> 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)).

[5] 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 (last visited May 10, 2013).

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. 104-369, at 34 (1995) (observing that this presumption is intended to "encourage institutional investors to take a more active role in securities class action lawsuits."). By opening the door to expanded securities-related litigation in state court, the Fifth Circuit's decision threatens to undo much of what Congress accomplished in the PSLRA and SLUSA.

B. Private lawsuits for aiding and abetting securities-related misstatements—which would clearly increase under the Fifth Circuit's approach—are particularly harmful to U.S. capital markets.

If SLUSA preclusion is relaxed—as it would be under the Fifth Circuit's approach—one of the inevitable consequences would be an increase in private state law class actions against secondary actors like law firms, auditors, and other professional services firms. This would thwart one of the most important limitations on private securities litigation: the prohibition on claims for aiding and abetting.

1. This Court first addressed this issue 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 169-70. Squarely reviewing 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 because "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).

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." *Id.* at 189. "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).

2. 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' 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." *Id.* at 163-64. 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." *Id.* at 164.

3. 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 be-

lieved 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).[6] 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).[7] 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.

The Fifth Circuit's decision only exacerbates this already-serious problem—particularly because of its impact on aiding and abetting claims. Especially where the primary violator has become judgment proof, plaintiffs often attempt to shift their losses entirely to the third parties that may have provided professional services before the entity's collapse. These third parties—often accounting firms or law firms—generally will not have received any direct profit from the fraudulent schemes, outside their ordinary professional fees. Still, the availability of aiding and abetting claims transforms these entities into insurers for their clients and exposes them to the risk

---

[6] *Available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (last visited May 10, 2013).

[7] *Available at* http://www.financialservicesforum.org/images/stories/20071211_global_capital__markets_survey.pdf (last visited May 10, 2013).

of massive liability. That risk may force such firms to settle the claims against them, regardless of merit. And the costs of those settlements—and of the skyrocketing cost of defending such actions—will inevitably be passed 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 accounting 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. Any expansion of such third-party litigation in state court—free from the limitations imposed by this Court's cases—would frustrate Congress's judgment that aiding and abetting claims are best investigated and prosecuted by the SEC, not by private parties. See 15 U.S.C. § 78t(e).

III. The risks and costs created by lawsuits like the ones at issue here are unnecessary because state and federal agencies already possess broad authority to prosecute both primary and secondary liability for securities-related misrepresentations.

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). Still, the Fifth Circuit refused to apply SLUSA, concluding that even these representa-

tions were "not more than tangentially related to the purchase or sale of covered securities." *Roland* v. *Green*, 675 F.3d. 503, 524 (5th Cir. 2012). The Court based this conclusion in part on the fact that the misrepresentations the plaintiffs ultimately received included "a host of things" in addition to any references to "instruments that might be SLUSA-covered securities." *Ibid.*

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).[8] Such lawsuits are an affront to the regulatory system Congress created to police those very abuses. See, *e.g., Buckman* v. *Plaintiffs' Legal Comm.,* 531 U.S. 341, 347–48 (2001) (holding state claims based on alleged fraud on the FDA preempted).

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 11

---

[8] 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 (last visited May 10, 2013).

(2006).[9] 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).[10]

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, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376 (2010); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011).[11] In 2011, the SEC's Division

---

[9] *Available at* http://www.law.du.edu/images/uploads/corporate-governance/empirical-committee-capital-markets-regulation.pdf (last visited May 10, 2013).

[10] *Available at* http://www.sec.gov/litigation/litreleases/2012/lr22352.htm (last visited May 10, 2013).

[11] 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 investigate and fully disclose any suspicions of fraud. See Robert S. Khuzami, Remarks to Criminal Law Group of the UJA—Federation of New York

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 12-13 (2011).[12] 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).[13] 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 enforcers for the kind of securities-related fraud alleged in this case. This Court should not adopt any reading of SLUSA that undermines that judgment.

CONCLUSION

The Fifth Circuit's decision below is inconsistent with the statutory language. It is also unwise and

---

(June 1, 2011), *available at* http://www.sec.gov/news/speech/2011/spch060111rk.htm (last visited May 10, 2013).

[12] *Available at* http://www.sec.gov/about/secpar/secpar2011.pdf (last visited May 10, 2013).

[13] *Available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf (last visited May 10, 2013).

unnecessary. DRI respectfully urges this Court to reverse the decision below.

Respectfully submitted.

LINDA T. COBERLY
MARISSA S. RONK
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com
mronk@winston.com

MARY MASSARON ROSS*
President of DRI
**Counsel of Record*
55 West Monroe
Suite 2000
Chicago, IL 60603
(312) 795-1101
mmassaron@plunkettcooney.com

GENE C. SCHAERR
STEFFEN N. JOHNSON
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com
sjohnson@winston.com

Counsel for Amicus Curiae

MAY 2013