No. 19-440

IN THE
Supreme Court of the United States

NORTHERN TRUST CORPORATION AND
NORTHERN TRUST COMPANIES,
Petitioners,

v.

LINDIE L. BANKS AND
ERICA LEBLANC,
Respondents.

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

MOTION FOR LEAVE TO FILE *AMICI CURIAE BRIEF* AND BRIEF OF THE AMERICAN BANKERS ASSOCIATION AND THE BANK POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN BANKERS ASSOCIATION AND THE BANK POLICY INSTITUTE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the American Bankers Association ("ABA") and the Bank Policy Institute ("BPI") hereby respectfully move for leave to file the accompanying brief as *amici curiae* supporting the petition in this case. Timely notice under Rule 37.1(a) of intent to file this brief was provided to the Petitioners and the Respondents. Petitioners Northern Trust Corporation and Northern Trust Company consented to the filing of this brief. Respondents Lindie L. Banks and Erica LeBlanc have withheld consent.

ABA is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include banks, savings associations, and nondepository trust companies of all sizes (collectively, "banks"). ABA works on behalf of nearly all of the approximately twelve hundred FDIC-insured institutions that provide trust and fiduciary services to individual and institutional customers.

BPI is a nonpartisan policy, research, and advocacy group that represents the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and major foreign banks conducting business in the United States. Collectively, BPI's member banks employ nearly 2 million Americans and are an engine for financial innovation and economic growth.

In view of their interests and unique perspective on the issues raised in this case, ABA and BPI respectfully request that the Court grant them leave to participate as *amici curiae* by filing the accompanying brief in support of the Petition for a Writ of Certiorari.

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INTEREST OF *AMICI CURIAE*[1]

The American Bankers Association ("ABA") is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include banks, savings associations, and nondepository trust companies of all sizes (collectively, "banks"). ABA works on behalf of nearly all of the more than twelve hundred FDIC-insured institutions that provide trust and fiduciary services to individual and institutional customers.

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To protect and promote the interests of the banking industry and its members, ABA and BPI

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.1(a) of intent to file this brief was provided to the Petitioners and the Respondents. Petitioners Northern Trust Corporation and Northern Trust Company consented to the filing of this brief. Respondents Lindie L. Banks and Erica LeBlanc have withheld consent.

frequently appear in litigation as *amici curiae* where the issues raised are of widespread importance to the industry.

This is just such a case. ABA and BPI have an abiding interest in safeguarding the orderly operation of the securities markets, including ensuring that their members are subject to uniform standards of conduct in connection with their participation in those markets. Class action complaints alleging misconduct in the securities markets are subject to strict federal standards so as to discourage meritless strike suits. The decision by the United States Court of Appeals for the Ninth Circuit, however, creates a broad new—and unwarranted—exception to these uniform standards by holding that financial institutions that offer trust services may not invoke the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1). In so doing, it threatens to upend the industry with a wave of costly state-law class actions alleging misconduct in connection with securities transactions. ABA and BPI have a substantial interest in ensuring that this result, which is the precise opposite of what Congress intended when passing SLUSA, does not occur.

SUMMARY OF ARGUMENT

This Court should hold, simply, that there is no "trustee exception" to SLUSA. The Ninth Circuit read such an exception into SLUSA, holding that trustees must defend state-law class actions that allege, at their heart, securities fraud. The Petition for a Writ of Certiorari ably explains why this decision was in error and why this Court should grant review. A trustee who is alleged to have engaged in self-dealing in nationally-traded securities is almost by definition alleged to have engaged in prohibited conduct "in connection with" securities transactions. The Ninth Circuit's holding otherwise distorts SLUSA's statutory text beyond recognition. Rather than repeat Petitioners' arguments, *amici* write to address two issues that warrant further consideration.

First, the Ninth Circuit's decision creates the very situation Congress sought to prevent in passing SLUSA. Congress enacted SLUSA to stop plaintiffs from making end-runs around the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1 and 78u. Absent SLUSA's application, plaintiffs could avoid the stringent pleading and other requirements contained within the PSLRA by bringing their claims under state, rather than federal, law—even where their theory of the case implicates federal securities laws. To ensure that plaintiffs bringing securities law claims are subject to uniform legal standards, Congress directed that SLUSA be applied broadly and enumerated the specific statutory exceptions to its scope.

The Ninth Circuit's creation of a new "trustee exception" runs contrary to Congress's intent. It exposes financial institutions to costly class action lawsuits bringing state-law claims that, at their heart, allege violations of the securities laws. If Congress sought to exempt trustees from SLUSA's scope, it could have expressly done so, much as it exempted claims against corporate officers and directors. The Ninth Circuit ignored Congress's intent, as well as the statutory text of SLUSA itself, in creating this new "trustee exception." It thereby opened the floodgates for a wave of costly, complex litigation against ABA and BPI members. The decision below also upends the careful federalism Congress established when passing SLUSA. Beneficiaries whose claims implicate federal securities laws may avail themselves of federal court, but their claims will be litigated pursuant to uniform federal law. Beneficiaries who bring traditional common claims—the adjudication of which varies state-by-state—bring those claims in the state probate courts best equipped to resolve them. The Ninth Circuit's ruling upsets this balance, allowing beneficiaries to bring state-law claims that nevertheless implicate federal securities laws, and to do so in federal court.

Second, the decision below rests on a misreading of this Court's opinion in *Chadbourne & Park LLP v. Troice*, 571 U.S. 377 (2014), which can and should be corrected. As this Court is aware, *Troice* involved a defendant that purchased uncovered securities for the plaintiffs' benefit while making misrepresentations about covered securities it held for its own benefit. This Court held that SLUSA did not apply to preempt the plaintiffs' claims. The Ninth Circuit took *dicta* from this Court's opinion to conclude that this Court was setting forth a broad new rule regarding SLUSA's applicability. The Court below reasoned that *Troice* creates a new "control" test: whether a defendant may invoke SLUSA depends upon whether the plaintiff had "control" over the defendant. This Court made no such distinction in *Troice*. That case turned on the fact that the defendant purchased *uncovered* securities for the plaintiffs' benefit, not whether the plaintiffs "controlled" the defendant. Nor can this new "control" test be found in SLUSA's statutory text, which requires only that the deceptive conduct occur "in connection with" a covered securities transaction. This "control" test is also illogical, drawing a meaningless distinction between stockbrokers and trustees.

The Ninth Circuit's decision, standing alone, warrants review and reversal given the strong likelihood that plaintiffs' counsel will shop for that forum when bringing the surge of cases against trustees which is sure to follow. But the Ninth Circuit is not the only Court to misinterpret *Troice* in this manner. This Court therefore should take the opportunity to clarify that *Troice* does not impose a new "control" test before lower courts create further disruption by misreading *Troice* in this manner.

ARGUMENT

I. The Ninth Circuit's Ruling Invites the Very Flood Congress Sought to Prevent.

This case is precisely the type SLUSA was intended to eliminate: a nationwide class action, brought under state law, alleging misconduct in connection with transactions in nationally traded securities. By creating a newfound "trustee exception" to SLUSA, the Ninth Circuit not only departed from Congress's intent and the statutory text but also invited a flood of costly, complex litigation against banks acting as trustees ("corporate trustees").

A. SLUSA Was Enacted To Prevent Plaintiffs From Bringing State-Law Class Actions Alleging Deceptive Conduct in Connection with Securities Transactions.

In 1995, Congress enacted the PSLRA to curb "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006). As Congress recognized in passing the PSLRA, "the class-action device was being used to injure 'the entire U.S. economy'" through "nuisance filings, targeting deep-pocketed defendants[.]" *Id.* (quoting H.R. Conf. Rep. No. 104-369, p. 31 (1995)). The PSLRA thus sought to curb this abuse by, *inter alia*, imposing heightened pleading requirements in actions brought pursuant to Section 10(b) of the Securities Exchange Act and Rule 10b-5, limiting recoverable damages and attorney's fees, and mandating sanctions for frivolous litigation. *See id.*

But the PSLRA did not end the problem. "Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court." *Id.* at 82. As Congress recognized, "this phenomenon was a novel one; state-court litigation of class actions involving nationally traded securities had previously been rare." *Id.* (citing H.R. Rep. No. 105-640, p. 10 (1998); S. Rep. No. 105-182, pp. 3-4 (1998)). This novel end-run circumvented the

PSLRA's core purpose of "protect[ing] the interests of shareholders and employees of public companies that are the target of meritless 'strike' suits." H.R. Rep. No. 105-803 (1998). Accordingly, to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA]," "Congress enacted SLUSA." *Dabit,* 547 U.S. at 86. (citing Pub. Law. 105-353, § 2(5), 112 Stat. 3227).

SLUSA operates relatively simply. When a plaintiff brings a covered class action under state law and alleges, "in connection with the purchase or sale of a covered security," that the defendant either made "a misrepresentation or omission of a material fact" or "used or employed any manipulative device or contrivance," the action must be removed to federal court if brought in state court and, in any event, subsequently dismissed. 15 U.S.C. § 78bb(f)(1).[2] SLUSA must, by necessity, sweep broadly. "A narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose[.]" *Dabit*, 547 U.S. at 86. Indeed, were it otherwise, plaintiffs could simply 'plead around' SLUSA by bringing a claim that "is a securities fraud wolf dressed up in breach of contract

[2] A "covered class action" is an action that seeks damages "on behalf of more than 50 persons or prospective class members." 15 U.S.C. §§ 77p(f)(2), 78bb(f)(5)(B). "Covered securities," in turn, are defined as securities that are (1) listed, or authorized for listing, on a national securities exchange or (2) issued by an investment company registered under the Investment Company Act of 1940 (*i.e.*, a mutual fund). 15 U.S.C. §§ 77r(b), 78bb(f)(5)(E).

[or fiduciary duty] sheep's clothing." *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 693 (S.D.N.Y. 2006); *see also Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1114 (9th Cir. 2013) ("[SLUSA] bars class actions brought under state law, whether styled in tort, contract or breach of fiduciary duty, that in essence claim misrepresentation or omission in connection with certain securities transactions.").

B. The Ninth Circuit Created a New "Trustee Exception" to SLUSA Divorced from Congress's Intent and the Statutory Text.

In drafting SLUSA, Congress worked carefully. Where it sought to exempt certain conduct from SLUSA's preemptive scope, Congress created specific carve-outs within the statute. As this Court explained in *Dabit*:

> [T]he tailored exceptions to SLUSA's pre-emptive command demonstrate that Congress did not by any means act 'cavalierly' here. The statute carefully exempts from its operation certain class actions based on the law of the State in which the issuer of the covered security is incorporated, actions brought by a state agency or state pension plan, actions under contracts between issuers and indenture trustees, and derivative actions brought by shareholders on behalf of a corporation.

Dabit, 547 U.S. at 87 (citing 15 U.S.C. §§ 78bb(f)(3)(A)-(C); (f)(5)(C)). Indeed, the Senate Committee on Banking, Housing, and Urban Affairs recognized that SLUSA would preempt most state-law class actions against fiduciaries premised on securities transactions and expressly carved out claims against corporate officers and directors for breach of their fiduciary duties. *See* S. Rep. No. 105-182 (1998), at 6 ("The Committee is keenly aware of the importance of state corporate law, specifically those states that have laws that establish a fiduciary duty of disclosure. It is not the intent of the Committee in adopting this legislation to interfere with state law regarding the duties and performance of an issuer's directors or officers . . . .").

"The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions." *Dabit*, 547 U.S. at 87-88. Nevertheless, the Ninth Circuit did exactly that. In holding that trustees alleged to have engaged in deceptive conduct in connection with securities transactions may not invoke SLUSA, the Court read into the statute a new "trustee exception." This new exception departs from Congress's clearly expressed intent. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

C. The Ninth Circuit's Decision Invites a Flood of Unwieldy State-Law Securities Class Actions.

SLUSA was passed, as its name indicates, to impose *uniform standards* on class action securities litigation. *See* 15 U.S.C. § 78a(5) (explaining that SLUSA's purpose is to "enact *national* standards for securities class action lawsuits involving nationally traded securities") (emphasis added). The Ninth Circuit's ruling undoes this work. As Petitioners note, given that at least one beneficiary of every major corporate trustee will reside within the Ninth Circuit, every large financial institution offering trust services will be forced to contend with state-law class action claims. *See* Petitioners' Br. at 22.

These cases not only create enormous new exposure for the financial industry but they will be uniquely difficult to litigate. ERISA fiduciaries already face a deluge of lawsuits from plan participants alleging they breached their fiduciary duties when investment options did not perform to the plaintiffs' liking.[3] Corporate trustees, who manage over $4 trillion in assets held in more than half-a-million trust accounts, will now face similar exposure.[4] Just as plan fiduciaries frequently find

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[3] *See* George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, Center for Retirement Research at Boston College, No. 18-8, at 1-2 (May 2018) ("[O]ver 100 new 401(k) complaints were filed in 2016-2017—the highest two-year total since 2008-2009.").

[4] *See* F.D.I.C., *Quarterly Banking Profile Fourth Quarter 2018*, at 14 (2018).

themselves mired in fact-intensive cases with expensive, one-sided discovery, so too will corporate trustees now be required to produce reams of documents regarding their fiduciary decision-making processes and furnish executives for depositions. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) ("[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the . . . fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times.").

But their situation will in fact be worse. ERISA litigation, while burdensome, is at least fought on the well-defined battlefield of federal law. This new front of trustee litigation will be brought under *state* law. And because these cases will be brought as putative nationwide class actions, litigants and federal courts will be required to navigate and interpret a patchwork of *state* fiduciary laws. While the federal courts may ultimately decline to certify nationwide classes given the substantive differences in states' trust laws, many corporate trustees will likely choose to settle rather than incur the enormous discovery expenses attendant to litigating to a certification decision.[5]

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[5] The laws regarding trust administration, and the trustee's duties thereunder, are complex and vary state-by-state. *See, e.g.*, *In re Trust Under Will of Flint for the Benefit of Shadek*, 118 A.3d 182, 194 (Del. Ct. Ch. 2015) (noting that majority of states prioritize effectuating the intent of the settlor in trust admin-

(cont'd)

This result runs directly contrary to SLUSA's purpose.

The Ninth Circuit's decision also upends the federalism concern that animates SLUSA. The statute ensures that beneficiaries who bring claims that implicate violations of federal securities laws are subject to a uniform federal standard. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir. 2005) ("SLUSA furthers the uniform application of federal fraud standards without expanding or constricting the substantive reach of federal securities litigation."). Traditional common law claims against trustees are properly adjudicated in state probate or chancery courts, which possess the requisite subject matter expertise to resolve them given they daily adjudicate such claims. The decision below destroys this dividing line, allowing beneficiaries to bring common law claims implicating federal securities laws in a federal court that will be forced to interpret other states' laws.

II. This Court Should Clarify *Troice*.

The Ninth Circuit acknowledged that its decision conflicts with the Sixth and Eighth Circuits' decisions in *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), and *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008). *See* Petitioners' App'x at 14a. In those cases, the courts rightly held that SLUSA precludes state-law fiduciary duty class

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istration but others have "moved towards prioritizing the wishes of beneficiaries").

action claims brought by beneficiaries against trustees. But the Ninth Circuit held that *Segal* and *Siepel* are no longer good law in light of this Court's holding in *Troice*. *See id.* at 14a-16a. In so holding, the Ninth Circuit misconstrued *Troice* and joined a small but growing number of courts that have similarly misread this Court's opinion, throwing the courts below into disarray.

A. The Ninth Circuit Misconstrued *Troice* As Imposing a "Control" Test.

In *Troice*, plaintiffs purchased uncovered securities on the basis of the defendant's misrepresentations regarding the safety of covered securities it held for its own benefit. *See Troice*, 571 U.S. at 396. This Court explained that SLUSA's "in connection with" requirement was not met because the misrepresentations concerned the defendant's covered securities, not plaintiffs' uncovered securities. *See id.* ("At most, the complaints allege misrepresentations about the Bank's ownership of covered securities[.]"). This Court remarked the "connection" must be one that "makes a significant difference to someone's decision to purchase or sell a covered security" and, in the context of that particular fact pattern, the decision to buy or sell must therefore be made by "a party other than the fraudster." *Id.* at 387-88.

This Court did *not* hold that SLUSA applies only where the plaintiffs controlled the decision to purchase or sell securities. Such a ruling would have overruled *Dabit* (where the plaintiffs maintained ownership interests in, but did not purchase or sell, the covered securities), which the Court expressly declared it was *not* doing. *See Troice*, 571 U.S. at 387 ("We do not here modify *Dabit.*"). And it would have similarly rendered *S.E.C. v. Zandford*, 535 U.S. 813 (2002), a dead letter. In that case, this Court held that securities transactions made by a stockbroker without his clients' consent satisfied the identical "connection" requirement in Section 10(b) of the Securities Exchange Act and Rule 10b-5. *See id.* at 821. This Court took pains in *Troice* to note that its decision was supported by, rather than abrogated, its prior jurisprudence. *See Troice*, 571 U.S. at 388 (stating "prior case law supports our interpretation" and citing, *inter alia*, *Dabit* and *Zandford*). In short, *Troice* did not alter the fundamental proposition that a defendant who purchases covered securities for the plaintiffs' benefit is subject to the securities laws. *See id.* at 389 (explaining that a fraud is "in connection with" a securities transaction where the alleged victims "maintained an ownership interest" in the securities).[6]

Nevertheless, the Ninth Circuit seized on this Court's "party other than the fraudster" remark to make a series of logical leaps. The Court first drew a distinction between trustees of irrevocable trusts and stockbrokers or investment advisers, concluding that

[6] Trust beneficiaries have equitable ownership interests in the assets of their trusts. *See* 90 Corpus Juris Secundum Trusts § 66 (2005) ("Indeed, for a trust to be a trust, legal title of the trust property must immediately pass to the trustee, and the beneficial or equitable interest to the beneficiaries."). Were it otherwise, the plaintiffs in this action would have no standing to bring their claims.

a beneficiary has "no control" over the former but that a client "controls and directs" the latter. Petitioners' App'x at 11a-13a. The Ninth Circuit then reasoned that this Court's comment in *Troice* forecloses trustees from invoking SLUSA, but not stockbrokers or other entities, given the difference in the "degree of control" that clients of those entities maintain. *Id.* at 1052 (explaining that the "degree of control" distinguishes the instant case from *Zandford*).

This reasoning makes no sense. As noted, this Court's holding in *Troice* was that claims premised on transactions in *uncovered* securities are not preempted by SLUSA. This Court had no reason to, and did not, opine on whether a plaintiff must have some form of "control" over a defendant for the alleged misconduct to fall within the scope of the securities laws. Moreover, the Ninth Circuit's opinion is at war with itself. If, as the Court below (incorrectly) reasoned, *Troice* forecloses SLUSA's use where the defendant is "both the buyer and the 'fraudster,'" Petitioners' App'x at 17a, then it must do so in all cases regardless of whether the buyer is a trustee, stockbroker, or some other party. The Ninth Circuit's attempt to graft a "control" test into SLUSA thus does not even comport with its own misinterpretation of this Court's "party other than the fraudster" comment.

The Ninth Circuit's "control" test is also neither legally nor practically meaningful. SLUSA does not turn on whether the plaintiff has "control" over the securities transaction; rather, by its own terms, SLUSA requires only that the fraudulent conduct occur *in connection with* the transaction. *See* 15 U.S.C. §78bb(f)(1). There is also no practical difference between the control a client exercises over a stockbroker accused of making concealed discretionary transactions in a client's account (as in *Zandford*) and the control a beneficiary exercises over a trustee's investment decisions in a trust.[7] That one case would fall within the ambit of the securities laws while the other would not is incoherent.

The "control" test newly created by the Court below will also lead to absurd and plainly unintended consequences. As Petitioners note, a holding that deceptive conduct does not occur "in connection with" a securities transaction where the purchaser is a trustee necessarily means that the Securities and Exchange Commission lacks enforcement authority over the actions of trustees. *See* Petitioners' Br. at 25. It similarly entails that beneficiaries cannot sue trustees for securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5.

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[7] In practical terms, beneficiaries *do* exercise some form of control over trustees, even trustees of irrevocable trusts. The beneficiary has the right to challenge transactions in probate or chancery court, seeking—among other remedies—to void the transaction or have the trustee removed. State probate and chancery courts are uniquely situated to evaluate charges that the trustee breached its fiduciary duty through consideration of the trustee's specific actions, applicable state law, the needs of all of the beneficiaries, the text of the trust instrument, the trust portfolio as a whole, and other necessary considerations. Where a beneficiary's claim is for traditional breach of fiduciary duty—not securities fraud, as here—that claim could and should be adjudicated in state probate or chancery court.

The Ninth Circuit's misinterpretation of *Troice*, and its resulting decision that trustees are excepted from SLUSA's scope, brings it into direct conflict with the Sixth and Eighth Circuits. The conflict does not end there. A small but growing number of district courts have similarly allowed state-law class actions against trustees alleging deceptive conduct in connection with securities transactions, on the theory that *Troice* forecloses them from invoking SLUSA. *See Henderson v. Bank of New York Mellon Corp.*, 146 F. Supp. 3d 438, 443 (D. Mass. 2015) (holding that defendant trustee could not invoke SLUSA because "the plaintiff, as a trust beneficiary, was powerless to buy or sell covered securities" and "[t]he analysis in both [*Segal* and *Siepel*] is foreclosed by *Troice*"); *Bernard v. BNY Mellon, N.A.*, No. 2:18-CV-00783, 2019 WL 2462606 (Apr. 25, 2019), *report and recommendation adopted*, 2019 WL 2492293 (June 14, 2019) (same). These decisions create confusion and disarray amongst litigants and the courts—and encourage forum shopping. In some jurisdictions, courts will correctly interpret *Troice* as a case concerning uncovered securities. *See, e.g., Gray v. TD Ameritrade, Inc.*, No. 18-C-00419, 2019 WL 2085136, at *3-4 (N.D. Ill. May 13, 2019) ("The Supreme Court . . . ha[s] affirmed that a plaintiff need not personally make the investment decision to satisfy the 'in connection with' requirement; rather, the fraud has to coincide with the covered securities transaction."). But it is already clear that others will seize on this Court's *dicta* to draw incorrect and unwarranted conclusions.

The result of these misinterpretations is that corporate trustees will be hampered when attempting to prudently invest in accordance with their fiduciary duties. The Uniform Trust Code and every state's trust laws expressly permit corporate trustees to invest in mutual funds managed by an affiliate. *See, e.g.*, Unif. Trust Code 802(f). The offering of, and investment in, affiliated funds is "universal among . . . the financial services industry." *Dupree v. Prudential Ins. Co. of Am.*, No. 99-cv-08337, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 10, 2007). Indeed, the Department of Labor has recognized the propriety of financial service institutions' use of mutual funds managed by an affiliate. *See* Dep't of Labor Notice of Proposed Rulemaking, Participant Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) ("[I]t would be contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor."). Nevertheless, as a result of the Ninth Circuit's decision, corporate trustees may feel compelled to instead invest in unaffiliated funds with lower potential returns so as to avoid facing state-law class actions alleging self-dealing. *See* Mellman & Sanzenbacher, *supra* note 3, at 4 (explaining that even where mutual fund selection may be prudent, "fiduciaries may believe it is beneficial to avoid the risk" of litigation "altogether").

The Ninth Circuit's creation of a "trustee exception" will thus harm the very group that the Court below apparently sought to protect. Individual beneficiaries' trusts will generate lower returns than those potentially achievable through investment in affiliated funds. And as the ERISA experience shows, this will result in the worst of both worlds for corporate trustees: having refrained from investing in affiliated funds so as to avoid costly state-law class actions, they may then be sued by beneficiaries for failing to maximize their returns. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (noting that an ERISA fiduciary often "finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued . . . but if he stops investing and the stock goes up he may be sued"); *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 888 (E.D. Mich. 2008) (noting that imprudent investment claims require a fiduciary to "navigate a narrow channel . . . the Scylla . . . lurks on one side, while the Charybdis . . . swirls on the other").

This Court should therefore take the opportunity to clarify its holding in *Troice*. This Court did not create a "control" test, nor can one be found in SLUSA's text. While a purchaser of *uncovered* securities for another's benefit may not invoke the statute, a purchaser of *covered* securities—be it a trustee, stockbroker, or other entity—may do so where the plaintiffs bring a covered class action alleging deceptive conduct in connection with the transaction. This Court may swiftly and decisively resolve any continuing confusion on this point by granting review of this case and clarifying the scope of its prior holding.

CONCLUSION

Amici respectfully ask this Court to grant certiorari.

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