No. 21-

IN THE

Supreme Court of the United States

EDWARD D. JONES & CO., L.P., *et al.*,

Petitioners,

v.

EDWARD ANDERSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA") precludes class actions bringing state-law claims alleging deception "in connection with the purchase or sale of a covered security" (*e.g.*, a federally regulated mutual fund or exchange-listed stock). This Court held in *Merrill Lynch, Pierce, Fenner & Smith v. Dabit* that SLUSA's "in connection with" requirement is met when the alleged deception "coincide[s]" with a transaction in a covered security – the same meaning given identical language in the Securities Exchange Act. This Court reaffirmed *Dabit*'s "coincide" standard in *Chadbourne & Parke v. Troice*, which addressed claims by plaintiffs who were induced to purchase *uncovered* securities; this Court held SLUSA did not preclude such claims because the alleged misrepresentations lacked a material connection to the purchase of a *covered* security. The Courts of Appeals have split as to whether *Troice* narrowed *Dabit*'s interpretation of SLUSA's "in connection with" language to require, even in a case like this one that undisputedly involves covered securities, a direct causal relationship between the alleged deception and an investment decision by someone other than the alleged wrongdoer.

The question presented is:

Whether the Ninth Circuit, in conflict with other Courts of Appeals, erred in concluding that *Troice* narrowed *Dabit*'s interpretation of SLUSA's "in connection with" prong to require that the alleged deception induce a specific transaction in a particular covered security.

PARTIES TO THE PROCEEDING

1. Petitioners Edward D. Jones & Co., L.P., The Jones Financial Companies, L.L.L.P., EDJ Holding Co., Inc., James D. Weddle, and Vincent J. Ferrari were defendants in the district court and appellees below.

2. Respondents Edward Anderson, Coleen Worthington, and Janet Goral were plaintiffs in the district court and appellants below.

RULE 29.6 DISCLOSURE STATEMENT

1. Edward D. Jones & Co., L.P. d/b/a Edward Jones' parent companies are EDJ Holding Company, Inc. and The Jones Financial Companies L.L.L.P. No publicly held companies own 10% or more of Edward D. Jones & Co., L.P. d/b/a Edward Jones.

2. The Jones Financial Companies, L.L.L.P., does not have a parent company. No publicly held companies own 10% or more of The Jones Financial Companies, L.L.L.P.

3. EDJ Holding Company, Inc.'s parent company is The Jones Financial Companies, L.L.L.P. No publicly held companies own 10% or more of EDJ Holding Company, Inc.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Anderson v. Edward D. Jones & Co., L.P.*, No. 19-17520, 990 F.3d 692 (9th Cir. Mar. 4, 2021), *reh'g denied*, Order at 1 (9th Cir. May 14, 2021); and
- *In re Edward D. Jones & Co., L.P. Sec. Litig.*, No. 2:18-CV-00714-JAM-AC (E.D. Cal. Nov. 12, 2019) (judgment).

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PETITION FOR A WRIT OF CERTIORARI

Edward D. Jones & Co., L.P., The Jones Financial Companies, L.L.L.P., EDJ Holding Co., Inc., James D. Weddle, and Vincent J. Ferrari respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-31a) is reported at 990 F.3d 692. The Ninth Circuit's order denying rehearing (Pet. App. 52a-53a) is unreported. The Eastern District of California's decision (Pet. App. 32a-51a) is unreported but available at 2019 WL 5887209.

JURISDICTION

The Ninth Circuit issued its decision on March 4, 2021. A timely petition for rehearing and rehearing en banc was denied on May 14, 2021. On March 19, 2020, this Court issued an order extending the filing deadline for all petitions for writs of certiorari to 150 days from the date of the lower court's order denying rehearing. On July 19, 2021, this Court rescinded that order, but only for petitions to review orders issued after that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Securities Litigation Uniform Standards Act provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> **(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).

INTRODUCTION

Through the Private Securities Litigation Reform Act ("PSLRA") and the Securities Litigation Uniform Standards Act ("SLUSA"), Congress directed that securities class actions should be decided under federal law in federal court. As a critical part of the legislative scheme, SLUSA prohibits any state-law class action alleging a material misrepresentation or omission, or any other deceptive conduct, "in connection with the purchase or sale of a covered security." This Court interpreted that requirement broadly in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006), holding it is sufficient if the alleged fraud "coincide[s]" with a securities transaction. This Court reaffirmed *Dabit*'s "coincide" standard in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), while addressing an alleged fraud involving uncovered securities, where the only connection to covered securities was the alleged wrongdoer's false claim that the uncovered securities were backed by investments in covered securities. In holding SLUSA's bar inapplicable, *Troice* focused on the plaintiffs' lack of interests in covered securities and held an alleged deception inducing a purchase of an uncovered security must have a material connection to a purchase or sale of a covered security.

In the decision below, the Ninth Circuit joined one side of a growing circuit split regarding the proper standard after *Troice* for applying SLUSA's "in connection with" requirement to state-law claims alleging deceptive schemes involving covered securities. According to the First, Third, and Ninth Circuits, *Troice* abandoned *Dabit*'s "coincide" test and introduced a more-demanding implied materiality element that renders SLUSA applicable only if the alleged deception induced an investment decision with respect to a particular security by someone other than the alleged wrongdoer. The Seventh and Eighth Circuits, on the other hand, recognize that *Troice* was limited to issues of covered versus uncovered securities and continue to apply the broad *Dabit* "coincide" standard to alleged deception involving covered securities. The conflicting approaches have resulted in contradictory definitions of the standard by the circuits and inconsistent outcomes in the lower courts. The state-law claims that the Ninth Circuit allowed to proceed here would have been precluded in other courts.

This Court's review is needed to restore uniformity and address the confusion regarding this Court's decisions defining the critical scope of the federal securities laws. In addition to defining

SLUSA preclusion, the "in connection with" requirement also establishes the reach of securities fraud prohibitions, including Section 10(b) and Rule 10b-5. By interpreting "in connection with" narrowly, the Ninth Circuit's decision not only subjects participants in the securities industry to multiplicitous and potentially abusive state-law class actions that Congress intended to preclude, but also threatens to limit the effectiveness of the federal securities laws. The Ninth Circuit's standard cannot be reconciled with this Court's decisions. This Court should grant certiorari to address this recurring and fundamental question of securities law and preserve the reforms Congress enacted in the PSLRA and SLUSA.

STATEMENT

A. Statutory Framework

1. In 1995, Congress revisited the securities laws to address abuses found in private securities litigation. Some securities class actions were "injur[ing] the entire U.S. economy" through "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent[ed].'" *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, p. 31 (1995)).

In response to those concerns, Congress enacted the PSLRA, 15 U.S.C. § 78u-4, to weed out frivolous suits and deter abusive practices in private actions under the federal securities laws. *See, e.g.*, H.R. Conf. Rep. No. 104-369, p. 31. For example, the PSLRA established heightened pleading burdens, created a safe harbor for forward-looking statements, and limited available damages and attorneys' fees. *Dabit*, 547 U.S. at 81-82; 15 U.S.C. § 78u-4. The PSLRA also introduced measures aimed at the conduct of litigation, such as requirements for lead plaintiffs and settlements in securities class actions, mandatory sanctions for frivolous litigation, and discovery stays while a motion to dismiss is pending. *Dabit*, 547 U.S. at 81-82; 15 U.S.C. § 78u-4.

2. Some class-action plaintiffs' lawyers sought to circumvent the PSLRA's demanding requirements by repackaging federal securities claims as state-law claims based on the same conduct. *See* S. Rep. 105-182, pp. 3-4 (1998) (discussing rise in state-law securities class actions); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 337 (1998) (reporting results of study demonstrating significant increase in state-law securities class actions). Such suits were "virtually unknown" prior to the PSLRA. S. Rep. 105-182, p. 4. This rise in state-law class actions involving publicly-traded securities threatened to undermine the PSLRA's reforms and create inconsistent standards for securities-related claims in the various states. *Id.* at pp. 3-4.

Congress passed SLUSA in 1998 to close this state-law loophole. SLUSA precludes covered class-actions based on state-law claims wherein a private party alleges "a misrepresentation or omission of a material fact" or the use of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of a covered security." 15 U.S.C. §78bb(f). SLUSA sought to ensure that federal law would provide the exclusive rule of decision for class actions asserting such claims.

3. In enacting SLUSA's "in connection with" requirement, Congress drew on language familiar from other provisions of securities law. One key provision, § 10(b) of the Securities Exchange Act, makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance . . . ." 15 U.S.C. § 78j(b). Similarly, Rule 10b-5, adopted pursuant to § 10(b), prohibits any device or scheme to defraud, misrepresentation or omission of a material fact, or fraudulent or deceptive practice "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

This Court has held that SLUSA's "in connection with" requirement should be interpreted consistently with the identical language in § 10(b) and Rule 10b-5. *Dabit*, 547 U.S. at 85-86. As a result, SLUSA bars any covered class action premised on state law that alleges conduct involving covered securities and falling within the scope of those provisions. *Id.*

4. This Court has interpreted "in connection with" broadly. For example, *S.E.C. v. Zandford*, 535 U.S. 813 (2002), addressed the meaning of "in connection with" in an action brought by the SEC under § 10(b) and Rule 10b-5. This Court explained the requirement "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.* at 819 (quotation marks omitted). This Court, therefore, refused to limit the provision to alleged deception related to market integrity, investor understanding, or the value of a particular security. *Id.* at 818, 820. Rather, it held that deceptive conduct is in connection with a securities transaction if "the scheme to defraud and the sale of securities coincide." *Id.* at 822. It is

sufficient that the alleged deception and securities transactions are "not independent events" but are part of the same fraudulent scheme. *Id.* at 820; *see also United States v. O'Hagan*, 521 U.S. 642, 656 (1997) (holding that § 10(b)'s "in connection with" element was satisfied in a misappropriation case where "[t]he securities transaction and the breach of duty . . . coincide . . . even though the person or entity defrauded is not the other party to the trade").

In *Dabit*, this Court again addressed the requisite connection between alleged deception and a securities transaction – this time in the context of SLUSA. 547 U.S. 71. The Court expressly held that the *same* "coincide" standard from § 10(b) defines the identical language delineating the scope of SLUSA preclusion. *Id.* at 85-86. This Court explained that a narrow interpretation of SLUSA would undermine the PSLRA's reforms and held "it is enough that the fraud alleged 'coincide' with a securities transaction – whether by the plaintiff or by someone else." *Id.*

This Court next examined SLUSA's reach in *Troice*, 571 U.S. 377, which arose from an alleged Ponzi scheme wherein the only securities bought or sold were uncovered securities. This Court noted that SLUSA – unlike § 10(b) and Rule 10b-5 – "focuses upon transactions in covered securities, not upon transactions in uncovered securities." *Id.* at 387; 15 U.S.C. § 78bb(f)(1) (referencing "the purchase or sale of a covered security");[1] *compare* 15 U.S.C. § 78j(b) &

[1] SLUSA defines a "covered security" by reference to the Securities Act of 1933. 15 U.S.C. § 78bb(f)(5)(E). That Act, in turn, defines a covered security as (1) a security qualified for trading in the national market system or listed on a national securities exchange; or (2) a security issued by a registered investment company. 15 U.S.C. § 77r(b)(1) & (2).

17 C.F.R. § 240.10b-5 (referencing purchase or sale of *any* security). Relying on that distinction, this Court explained that SLUSA bars only class actions alleging deception that is "material to the purchase or sale of a covered security." 571 U.S. at 387. But the *Troice* plaintiffs – unlike the alleged victims in "every securities case in which this Court ha[d] found a fraud to be 'in connection' with a purchase or sale of a security" – did not take, attempt to take, divest themselves of, attempt to divest themselves of, or maintain any "*ownership interest* in financial instruments that fall within the relevant statutory definition." *Id.* at 388. Therefore, this Court held their claims alleging fraud involving uncovered securities were not barred by SLUSA. *Id.* at 387. This Court emphasized that its holding did not "modify *Dabit*" or restrict the government's enforcement of § 10(b) or Rule 10b-5. *Id.* at 387, 393-94.

B. Factual and Procedural Background

1. This case arose from Respondents' decisions to transfer the assets in their Edward Jones commission-based accounts holding covered securities to investments held in fee-based advisory accounts, also holding covered securities, through sales of the assets. Respondents, plaintiffs below, alleged that they are "buy-and-hold" investors who do not conduct many trades throughout the year. Pet. App. 4a-5a. According to Respondents, they initially invested with Edward Jones through commission-based accounts that charged fees on a per-trade basis, but they subsequently chose to transfer the assets in those accounts to investments held in professionally-managed fee-based advisory accounts. *Id.* at 5a. With the advisory accounts, Edward Jones agreed to provide additional services and charged an annual

management fee based on a percentage of the assets held in the account (not based on the amount of trading). *Id.* Before choosing the advisory accounts, Respondents received disclosures from Edward Jones detailing the applicable fees and the accounts' potential advantages and disadvantages. *Id.* at 5a, 41a-42a.

Respondents' accounts were transitioned from the commission-based to the fee-based accounts "through a sale of the[ir] assets," and they authorized Edward Jones to sell any securities not permitted to be held in the advisory accounts. Pet. App. 28a, 29a n.10. Respondents further alleged that, after the transfer, Edward Jones conducted certain trades on their behalf in the accounts. *Id.* 27a. Those trades were conducted, they alleged, "to give the appearance that Edward Jones was managing the fee-based account" in an "deceptive" attempt to "justify its fees." *Id.*

2.a. Respondents brought putative class claims based on the account transfers. They alleged their accounts should not have been transferred because fee-based accounts are not suitable for buy-and-hold investors and resulted in significantly higher fees. Pet. App. 6a. Respondents asserted that Edward Jones' financial advisers were required to conduct a suitability analysis before recommending they switch to fee-based accounts but failed to do so. *Id.* Rather, according to Respondents, Edward Jones incentivized its financial advisors to recommend fee-based accounts, regardless of suitability, to generate higher fee revenue. *Id.* at 6a, 35a. Finally, Respondents alleged they would not have transferred their account assets had they known the advisers failed to analyze suitability. *Id.* at 7a-8a. Based on this same alleged conduct, Respondents brought claims for violations of

§ 10(b) and Rule 10b-5 *and* claims under Missouri and California common law, including a claim for breach of fiduciary duty. *Id.* at 6a-8a.

b. The district court dismissed Respondents' claims with prejudice. Pet. App. 33a. With respect to Respondents' federal securities claims, the court held their fee-related allegations could not state a claim because the nature of the fees and corresponding risks were fully disclosed and because Edward Jones did conduct a suitability analysis. *Id.* at 41a-43a. The court further held Respondents had failed to satisfy the heightened pleading requirements under the PSLRA and Fed. R. Civ. P. 9(b) for § 10(b) and Rule 10b-5 claims. *Id.* at 44a-48a.

Next, the court dismissed Respondents' state-law claims under SLUSA because they were based on the same factual allegations as their federal securities claims. Pet. App. 34a-39a. For example, the alleged breach of fiduciary duty was based on the same purported omissions and misrepresentations and the same supposed "scheme" regarding the suitability of the advisory accounts and the allegedly excessive fees. *Id.* at 35a-36a.

3. Respondents appealed only the dismissal of their state-law breach-of-fiduciary-duty claim, and the Ninth Circuit reversed, holding the claim was not barred by SLUSA. Pet. App. 4a. Specifically, the court held the alleged breach was not "in connection with" a purchase or sale of covered securities because the alleged deception did not induce an investment decision with respect to any particular security and the alleged breach was not based on any securities transaction. *Id.* at 20a-31a.

The Ninth Circuit's standard for applying SLUSA's "in connection with" prong stemmed from its interpretation of this Court's decision in *Troice.* In the court's view, *Troice* "shifted" the understanding of the requirement away from *Dabit*'s broad "coincide" test and "clarified" that the language included a more demanding implied materiality element. Pet. App. 16a-20a. After *Troice*, according to the court, the "in connection with" prong requires a material connection between the alleged omission or misrepresentation and an investment decision regarding a particular covered security; that is, the alleged deception must make "a significant difference to someone's decision to purchase or sell a covered security." *Id.* at 19a-20a.

Applying this test, the Ninth Circuit concluded the alleged lack of suitability analysis was not "in connection with" a covered securities transaction. The court held it was immaterial to the decision to purchase or sell covered securities because Respondents did not allege an impact on their trading behavior or on any investment decision regarding particular securities. Pet. App. 22a-23a. Rather, the alleged deception was material only to the decision to transfer accounts. *Id.* at 24a. And that decision, the court concluded, was not "intrinsic to the investment decision itself," *id.*, and, therefore, was not materially connected to a securities transaction.

The Ninth Circuit rejected the argument that the "in connection with" prong was satisfied by Respondents' allegations that the account transfers were accomplished through the sale of assets or that Edward Jones had purportedly made deceptive trades after the transfers to justify fees. Pet. App. 26a-29a & n.10. The court acknowledged these allegations regarding related securities transactions but held they were insufficient to trigger SLUSA. *Id.* The court found the asserted breach was "based on the alleged lack of a suitability analysis, not on post-transfer sales of securities." *Id.* at 29a n.10. And because the breach was complete when Respondents agreed to transfer accounts, the court concluded that none of the subsequent transactions was relevant to the "in connection with" analysis. *Id.*

4. The Ninth Circuit denied Edward Jones' timely petition for rehearing. Pet. App. 52-53a.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to resolve the proper scope of SLUSA preclusion and the federal securities laws after *Troice*. The decision below joined a growing split among the Courts of Appeals as to whether *Dabit*'s "coincide" standard survived *Troice* intact or whether "in connection with" now requires a causal relationship between the alleged deception and an investor's specific investment decision, even in a case involving covered securities. The different approaches among the circuits creates uncertainty on an important question under the federal securities laws and undermines the uniformity Congress sought to ensure through SLUSA.

This Court's review is also necessary to correct the Ninth Circuit's fundamental misunderstanding of this Court's decisions. The Ninth Circuit's formulation of the "in connection with" requirement is contrary to the broad standard this Court adopted in *Zandford*, *Dabit*, and other cases, and interprets *Troice* in a manner which directly contradicts this Court's express demarcation of the decision's scope. This Court's review is needed to restore the proper understanding of *Dabit* and *Troice* and, thereby, protect the important policies underlying the federal securities laws.

I. THE NINTH CIRCUIT DEEPENED AN EXISTING CONFLICT AMONG COURTS OF APPEALS REGARDING THE APPLICATION OF "IN CONNECTION WITH" AFTER *TROICE*.

A. *Troice* Addressed SLUSA's Application In Actions Involving Uncovered Securities.

The confusion in the lower courts results from inconsistent interpretations of this Court's decision in *Troice*. *Troice* arose from a multibillion-dollar Ponzi scheme ran by Allen Stanford in which victims were fraudulently induced to purchase uncovered securities. 571 U.S. 377, 384-85. Victims of Stanford's scheme brought private state-law actions against investment advisers, accountants, brokers, and law firms that allegedly facilitated or concealed the fraud. *Id.* at 385. The scheme resulted only in the purchase of *uncovered* securities; there were no transfers, purchases, or sales, of *any covered* securities by or on behalf of the victims. The plaintiffs, however, alleged they were falsely told those uncovered securities were backed by bank holdings in covered securities. *Id.* at 386. Relying on that link to the national securities market, defendants sought to dismiss the actions under SLUSA. *Id.* at 385.

This Court held the victims' actions were not barred because – regardless of its reach – SLUSA does not "extend further than misrepresentations that are material to the purchase or sale of a covered security." 571 U.S. at 387. This Court further elaborated, stating: "A fraudulent misrepresentation or omission is not made 'in connection with' such a 'purchase or sale of a covered security' unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" *Id.*

Explaining the context for this holding, this Court stressed that SLUSA is not concerned with transactions in uncovered securities, like those underlying the victims' claims. 571 U.S. at 387. Thus, SLUSA applies only when there is a "connection that matters" with the purchase or sale of a covered security. *Id.* *Troice* further explained that – for purposes of that case – such a connection exists "where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security, something about which the Act expresses no concern." *Id.* at 387-88. Finally, this Court noted the relevant investment decision must be made by someone other than the alleged wrongdoer. *Id.* at 388.

This Court then held the victims' actions were not barred by SLUSA because there was no meaningful connection between the alleged deception surrounding the purchase of uncovered securities and transactions involving covered securities. 571 U.S. at 396-97. No part of the scheme had touched on – or coincided with – any actual or attempted ownership interest in a covered security by the plaintiffs. Rather, the only alleged link concerned the false assurance that the uncovered securities at issue were backed by the bank's holdings in covered securities. *Id.* This Court found that tenuous relationship insufficient. *Id.* As this Court summarized, the fraud bore "so remote a connection to the national securities market that no person actually believed he was taking an ownership position in that market." *Id.* at 394.

B. The Courts of Appeals Have Split In Determining *Troice*'s Impact on the "In Connection With" Standard.

1. The Courts of Appeals have split in determining *Troice's* impact on the "in connection with" standard where, as here, the plaintiffs have an undisputed ownership interest in covered securities. The Seventh and Eighth Circuits continue to apply *Dabit*'s broad "coincide" standard to define the required connection between the alleged deception and a securities transaction. These circuits interpret *Troice* as applying only in the context of uncovered securities schemes and emphasize *Troice*'s express acknowledgment that "[w]e do not here modify *Dabit*." 571 U.S. at 387.

Thus, for example, in *Goldberg v. Bank of America*, 846 F.3d 913 (7th Cir. 2017), a plaintiff trustee brought state-law claims alleging a bank secretly retained fees received from mutual funds when clients' cash balances were swept into the funds at the end of each day. The Seventh Circuit affirmed the district court's dismissal under SLUSA, rejecting the plaintiff's argument that the alleged deception was not "in connection with" securities transactions. The court explained that "in connection with" does not require that the alleged deception relate to "price, quality, or suitability of any security." *Id.* at 916. According to the court, *Troice* "does not affect this conclusion, because customers were dealing directly with covered investment vehicles." *Id.* Rather, *Troice* holds only that SLUSA "does not apply when the *customer* invests in an asset that does not consist of, or contain, covered securities." *Id.* (emphasis added); *see also Holtz v. JPMorgan Chase Bank*, 846 F.3d 928, 933-34 (7th Cir. 2017) (relying on *Dabit* and *Zandford* to find "in connection with" prong satisfied even where the alleged deception did not impact the client's investment decision and noting that "[s]ometimes a plaintiff will be unable to show a material lie or omission, intent to deceive, or the existence of a purchase or sale . . . but *Dabit* holds that SLUSA applies whether or not a federal securities theory would succeed").

The Eighth Circuit likewise continues to apply *Dabit*'s "coincide" standard in interpreting SLUSA's "in connection with" prong and has declined to require a causal nexus between the alleged deception and a particular securities transaction. In *Zola v. TD Ameritrade*, 889 F.3d 920 (8th Cir. 2018), the plaintiffs alleged a breach of the duty of best execution because the defendant allegedly routed trades to venues that paid the highest payments for defendant's order flow. *Id.* at 922. In opposing dismissal, the plaintiffs argued for the same interpretation of "in connection with" adopted by the Ninth Circuit below. Specifically, the plaintiffs argued *Troice* changed the relevant standard, such that the alleged fraud must have "induced" a purchase or sale of a covered security. *Id.* at 925. The plaintiffs further argued the alleged deception was not "in connection with" a securities transaction because the alleged misconduct did not affect the decision to buy or sell covered securities. *Id.* Rather, the conduct merely affected the decision to place orders with defendant as opposed to some other broker. *Id.*

The Eighth Circuit rejected both arguments. *First*, the court explained that *Troice* expressly stated it was not modifying *Dabit*'s standard and that *Troice* involved an issue of uncovered versus covered securities. 889 F.3d at 926. *Second*, the Eighth

Circuit held the "in connection with" prong did not require that the alleged deception induce a purchase or sale of a covered security. *Id.* Rather, the alleged breach was material to every trade in covered securities because the defendant benefited every time it executed an order for its "duped customer." *Id.*

2. Contrary to the approach of the Seventh and Eighth Circuits, the First and Third Circuits – like the Ninth – apply *Troice* even when there is no dispute the alleged deception related to covered securities. Interpreting *Troice* broadly, these circuits hold SLUSA's "in connection with" prong is satisfied only where the alleged deception induces an investment decision by someone other than the alleged wrongdoer regarding a *particular* covered security. These circuits focus on *Troice*'s materiality language and elaboration "for present purposes" that a material connection is one "where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security, something about which the Act expresses no concern." 571 U.S. at 387-88.

Thus, despite acknowledging *Troice*'s express statement that "[w]e do not here modify *Dabit*," 571 U.S. at 387, the First, Third, and Ninth Circuits nonetheless conclude that *Troice* significantly narrowed *Dabit*'s "coincide" standard even in the context of alleged deception relating to *covered* securities. *See, e.g.*, Pet. App. 16a-20a; *United States v. McLellan*, 959 F.3d 442, 459 (1st Cir. 2020); *Taksir v. Vanguard Grp.*, 903 F.3d 95, 97-98 (3d Cir. 2018). These circuits hold *Troice*'s discussion of a "material" decision and "a connection that matters" imposes a more demanding threshold materiality requirement onto SLUSA's "in connection with" prong. *See, e.g.*, Pet. App. 16a-20a; *McLellan*, 959 F.3d at 459; *Taksir*, 903 F.3d at 97-98. Thus, under the approach of these circuits, allegations of deception affecting investment accounts or the client/advisor relationship, as opposed to investments in *specific* securities, are beyond the reach of SLUSA and the federal securities laws. These courts implicitly or expressly reject the view that *Troice*'s holding and analysis are limited to whether deception involving interests solely in *uncovered* securities fall outside SLUSA's preclusive scope – the question actually addressed by this Court. *See* 571 U.S. at 386-87; *Taksir*, 903 F.3d at 97-98.

For example, in *McLellan*, 959 F.3d 442 – a criminal case alleging violations of § 10(b) and Rule 10b-5 – the First Circuit concluded that *Troice* "infuse[d] the transactional nexus analysis with a determinative inquiry into materiality," and, thus, "the alleged fraud must reach a certain threshold of materiality to be deemed made 'in connection with' a transaction in securities." *Id.* at 459; *see also Hidalgo-Velez v. San Juan Asset Mgmt., Inc.*, 758 F.3d 98, 106 (1st Cir. 2014) (characterizing *Troice* as "[breaking] new ground in illuminating the contours of the 'in connection with' requirement"). To satisfy that standard, the court held the government must prove the fraud made a significant difference to a decision by someone other than the alleged wrongdoer to buy or sell a security. *McLellan*, 959 F.3d at 458.

Similarly, the Third Circuit relied on a broad reading of *Troice* in *Taksir*, 903 F.3d 95. There, the plaintiffs brought state-law claims alleging the defendant did not disclose higher commissions charged on certain accounts, and the defendant sought to dismiss the action under SLUSA. *Id.* at 96.

In addressing the nexus requirement, the Third Circuit rejected the argument that *Troice* applies only to issues of covered versus uncovered securities. *Id.* at 97-98. Rather, the court held *Troice* clarified "that materiality is relevant to the analysis of SLUSA's prohibitive scope." *Id.* at 97. And the court held the plaintiffs' allegations were not material as a matter of law because a reasonable investor would not be swayed by small overcharges. *Id.* at 99.

Much like the Ninth Circuit, the Third Circuit conflated SLUSA's "material fact" requirement with the "in connection with" prong. In finding the "in connection with" prong not satisfied, the Third Circuit focused primarily on the insignificant amount of the commission, particularly as compared to the value of the account and trades. That inquiry, however, fits more naturally under the question of whether the misrepresentation was of a "material fact," as opposed to whether it was "in connection with" a securities transaction.

Notably, as the Ninth Circuit recognized, Pet. App. 25a n.8, the approach in *Taksir* is very different from the Third Circuit's pre-*Troice* interpretations of SLUSA's nexus prong. In *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005), the plaintiffs alleged defendant issued biased research regarding the value of securities to curry favor with investment banking clients. *Id.* at 296-97. In finding the "in connection with" prong satisfied, the court stressed SLUSA's "flexible framework" and the "broad interpretation of the 'in connection with' element." *Id.* at 301-02. It was enough that "[t]he complaint sets forth a scheme 'coinciding' with the purchase or sale of misrepresented securities." *Id.* at 303. The *Rowinski* court did not engage in any materiality analysis to determine whether the "in connection with" element was met.

3. These divergent standards for analyzing the "in connection with" requirement after *Troice* have had a very real impact on how district courts in these circuits interpret SLUSA. Thus, district courts in the First and Third Circuits have held allegations of deceptive conduct by trustees or discretionary fund managers cannot satisfy *Troice*'s materiality standard because the deception did not impact the investment decisions of the plaintiffs or anyone other than the alleged wrongdoer. The courts found the allegations are not "in connection with" a securities transaction and fall beyond the scope of the securities laws. *See, e.g.*, *Walden v. Bank of N.Y. Mellon Corp.*, No. 2:20-CV-01972-CRE, 2021 WL 2317856, at *3-4 (W.D. Pa. June 7, 2021) (citing *Taksir*); *Bernard v. BNY Mellon, N.A.*, No. 2:18-CV-00783-CRE, 2019 WL 2462606, at *5 (W.D. Pa. Apr. 25, 2019) (concluding that "after *Troice*, a mere coincidence of fraud with a transaction in covered securities will no longer suffice for SLUSA preemption"); *Henderson v. BNY Mellon*, 146 F. Supp. 3d 438, 443-44 (D. Mass. 2015) (same).

In contrast, district courts in the Seventh and Eighth Circuits do not rely on *Troice* in analyzing the required transactional nexus. Instead, the courts look to *Dabit* and, accordingly, apply the broad interpretation of "in connection with" therein. *See Portell v. Zayed*, 375 F. Supp. 3d 1025, 1034-36 (N.D. Ill. 2019) (applying *Dabit*, *Holtz*, and *Goldberg* and finding SLUSA's nexus prong satisfied where defendant concealed conflicts of interest and, to accomplish the scheme, assets were transferred to new investment fund); *Bartle v. Fidelity Brokerage Servs. LLC*, No. 20-00064-CV-W-GAF, 2020 WL

8367532, at *7 (W.D. Mo. Sept. 15, 2020) (applying *Dabit's* "broad interpretation" to analyze SLUSA's nexus prong). This Court's review is needed to resolve the conflict in applying *Troice* and *Dabit* and provide much-needed guidance to the lower courts.

II. THE NINTH CIRCUIT'S STANDARD CONFLICTS WITH THIS COURT'S DECISIONS.

This Court's review is also necessary to restore the proper understanding of this Court's decisions defining the requisite transactional nexus under SLUSA and other federal securities laws. The Ninth Circuit's definition of the "in connection with" requirement conflicts with *Zandford*, *O'Hagan*, and *Dabit*, and the court applied *Troice* in a manner contrary to this Court's expressed intent.

A. *SEC v. Zandford*

In *Zandford*, the SEC brought claims under § 10(b) and Rule 10b-5 against a broker who stole funds from his client's investment account. 535 U.S. at 815. Relying on the broker's promises to invest conservatively, the client opened an investment account and authorized the broker to conduct securities transactions on the client's behalf without prior approval. *Id.* The broker then depleted the client's account by writing checks to himself that were redeemed through the liquidation of the client's securities. *Id.* at 815-16. This Court held the broker's deception was "in connection with" the securities transactions. *Id.* at 820-21.

In reaching that conclusion, this Court considered the entire fraudulent scheme. 535 U.S. at 820-21. This Court noted that the securities transactions facilitated the broker's fraud and that the broker knew the securities would be sold to redeem the checks. *Id.* Thus, the alleged deceptive practices and securities sales "were not independent events" but, rather, "coincided" with and furthered the same fraudulent course of conduct. *Id.* at 820. Given this, *Zandford* held the alleged fraud was sufficiently "in connection with" a securities transaction and fell within the scope of the federal securities laws. *Id.* at 820-21.

The factors *Zandford* did *not* emphasize in defining the requisite transactional nexus are also significant. For example, this Court rejected the lower court's holding that the alleged deception must relate to the market, value of a security, or investor understanding. 535 U.S. at 818, 820. Even more telling, this Court chose not to focus on whether the fraud impacted an investor's decision to purchase or sell a particular security. Indeed, the only transactions at issue were the otherwise lawful sales dictated by the alleged wrongdoer, and the only relevant decisions made by the client were the client's choice of broker and investment account. *Id.* at 815-16.

The Ninth Circuit's approach below flips *Zandford* upside down. *First*, the court refused to consider the entire alleged scheme in analyzing the "in connection with" prong or to assess whether securities transactions furthered the alleged deception. Respondents alleged the failure to conduct a suitability analysis was part of a scheme to induce clients to transfer their assets to fee-based accounts, and they alleged both that the transfers were accomplished through asset sales and that Edward Jones conducted trades to justify its fees. Pet. App. 5a, 26a-29a & n.10. The Ninth Circuit, however, held those transactions were not relevant to the "in connection with" inquiry because the alleged breach – the financial advisor's supposed failure to analyze suitability of a fee-based advisory account – was completed prior to the account transfers and was not "based on" the securities transactions. *Id.* 29a n.10.

Under *Zandford*, that analysis was unduly limited, as it ignored Respondents' own allegations that securities transactions were a critical part of the alleged scheme. Indeed, Respondents did not suffer any alleged harm until the accounts were transferred through the asset sales, and, therefore, the transactions were essential to any claim under state or federal law. As a result, the transactions were "not independent" events and instead "coincided" with the alleged scheme. The Ninth Circuit's decision to limit the analysis to the "breach" cannot be reconciled with *Zandford*'s test.

Second, the Ninth Circuit's definition of the "in connection with" prong rests on the very factors this Court found too restrictive. Unlike *Zandford*, the court below required that the alleged deception significantly impact Respondents' decisions to purchase or sell a particular security. Pet. App. 16a-20a. The Ninth Circuit repeatedly stressed that Respondents did not allege an impact on their trading behavior, and the court tied the "in connection with" requirement to whether the alleged deception was "intrinsic to the investment decision." *Id.* at 20a-26a, 29a n.10. Thus, the court found it insufficient that the alleged deception was material to Respondents' decisions to transfer account assets, delegate investment decisions, or remain with Edward Jones. *Id.* The facts in *Zandford*, however, show no greater nexus between the alleged deception and the securities transactions, and, as this Court held, nothing more is required.

In short, the Ninth Circuit ignored what this Court emphasized in *Zandford* and relied on what this Court rejected. Not surprisingly, the Ninth Circuit's resulting test is contrary to *Zandford*'s broad definition of the "in connection with" requirement.

B. *United States v. O'Hagan*

Nor can the Ninth Circuit's decision be reconciled with *O'Hagan*, 521 U.S. 642. There, the defendant was convicted of securities fraud under § 10(b) and Rule 10b-5 because he traded using "confidential information misappropriated in breach of a fiduciary duty to the source of the information." *Id.* at 647-49. This Court held that § 10(b)'s "in connection with" element was satisfied because the defendants' breach of duty "coincide[d]" with his securities transactions. *Id.* at 656. And that was "so even though the person or entity defrauded [wa]s *not* the other party to the trade, but [wa]s, instead, the source of the nonpublic information." *Id.* (emphasis added). The Court did not, therefore, ask whether the defendants' deceptive conduct was "material to a decision by one or more individuals (other than the fraudster) to buy or sell" securities. Pet. App. 17a. If § 10(b)'s "in connection with" prong required such an implied materiality inquiry, this Court would have rejected the government's misappropriation theory.

C. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*

For much the same reasons, the Ninth Circuit's standard is also contrary to *Dabit*. In *Dabit*, a former broker attempted to bring a state-law class action alleging that Merrill Lynch provided misinformation regarding certain stocks and that clients and brokers held the stocks too long as a result. 547 U.S. at 75. As a "holder" action, the private plaintiffs' claims could not be pursued under the federal securities laws because the implied action to enforce those provisions is limited to purchasers and sellers. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975). The question before this Court was whether SLUSA barred the action even though the plaintiffs could not bring a federal claim.

Interpreting SLUSA's "in connection with" prong consistently with the same language in § 10(b) and Rule 10b-5, this Court held SLUSA's preclusive scope is defined by the expansive standard adopted in *Zandford* and *O'Hagan*. *Dabit*, 547 U.S. at 85. Thus, "it is enough that the fraud alleged 'coincide' with a securities transaction – whether by the plaintiff or by someone else." *Id.* *Dabit* expressly reaffirmed that standard's breadth and explained that a narrow interpretation of the "in connection with" language would "undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose." *Id.* at 86. Unlike the Ninth Circuit's decision below, nothing in *Dabit* suggests the alleged deception must significantly impact an investor's decision to purchase or sell a particular security or that the alleged state-law violation must be based on a securities transaction.

D. *Chadbourne & Parke v. Troice*

The Ninth Circuit acknowledged tension with the broad standard from this Court's prior cases, but the court concluded *Troice* had "shifted" the understanding of the "in connection with" requirement in introducing a limiting materiality element. Pet. App. 16a-20a. That is the exact interpretation of *Troice*, however, suggested by the *dissent*. 571 U.S. at 400, 403 (Kennedy, J., dissenting) (arguing that the majority had "adopt[ed] a new approach, an approach which departs from the rules established in" prior cases, and had "revisit[ed] *Dabit*'s logic"). The majority, on the other hand, expressly rejected "the dissent's characterization of [its] holding" and the suggestion that it had "modif[ied] *Dabit*." *Id.* at 381, 387. The Ninth Circuit, therefore, applied *Troice*'s implied materiality inquiry in a manner not contemplated by that decision and outside the context of the concerns that animated this Court's opinion.

1. The Ninth Circuit's interpretation of *Troice* wholly ignores the critical context of this Court's discussion. In *Zandford*, *O'Hagan*, and *Dabit*, this Court focused on the transactional element of the "in connection with" prong; the nature of the securities was not an issue. In *Troice*, however, the distinction between covered and uncovered securities was paramount. 571 U.S. at 386-93. The primary question was whether a fraud involving uncovered securities nonetheless presented a sufficient connection to covered securities to fall within SLUSA. In finding SLUSA inapplicable, this Court stressed that the Act was concerned with deception related to transactions involving covered – not uncovered – securities. *Id.* at 387.

Moreover, while this Court indicated there must be a "connection that matters" to a covered-security transaction, 571 U.S. at 387-88, the materiality discussion relied heavily on whether the plaintiffs had actual or attempted ownership interests in covered securities as part of the scheme. *Id.* at 387-89. This Court noted the federal securities laws refer to transactions that result in "the taking or dissolving of ownership positions" and found the laws were not intended to protect individuals with a more attenuated connection to securities. *Id.* at 389-90. This Court further explained that its prior cases finding a sufficient link to securities transactions involved alleged victims "who took, who tried to take, who divested themselves of, who tried to divest themselves of, or who maintained an ownership interest" in relevant securities. *Id.* at 388. For example, this Court explained that the facts in *Zandford* demonstrated the requisite material connection – even though the deception did not induce the client to make any investment decision with respect to particular securities – because the broker sold *the client's* securities to further the fraud. *Id.* at 389. In comparison, this Court stressed that the *Troice* plaintiffs did not have any actual or attempted interest in a covered security as part of the scheme. *Id.* at 396-97.

The Ninth Circuit did not interpret *Troice* in light of the concerns regarding interests in covered versus uncovered securities. Instead, the court focused on the implied materiality element, which the court interpreted to require a direct causal connection to a securities transaction and a significant impact on an investment decision regarding particular securities. In so doing, the Ninth Circuit's approach divorced language in *Troice* from the context of this Court's determination and contradicted this Court's expressed explanation of the principles therein.

2. The Ninth Circuit's application of *Troice* also contradicts this Court's explicitly stated intent regarding the decision's scope. Although the dissent decried *Troice*'s "new approach" and departure from

the "coincide[]" standard applied in *Dabit* and earlier cases, 571 U.S. at 400, 404-09 (Kennedy, J., dissenting), the majority in *Troice* did not believe the decision worked any sort of jurisprudence-shifting change, *id.* at 381, 390, 393-94. Nothing in *Troice* suggested a need to walk-back the interpretation of the "coincide" standard, and this Court did not express any concern over the breadth of that test. Rather, *Troice* repeatedly stressed that its holding was fully consistent with prior interpretations of the "in connection with" language under the federal securities laws. *Id.* at 387-89, 393-94. Indeed, this Court took great pains to clarify that it was <u>*not*</u> modifying the *Dabit* standard and had no intent of narrowing the understanding of the required transactional nexus. *Id.* at 387.

Accordingly, this Court did not envision that *Troice* would significantly impact SEC enforcement or the scope of SLUSA preclusion. Again, this Court relied on the distinction between covered and uncovered securities. Thus, this Court highlighted the fact that the SEC's authority under § 10(b) and Rule 10b-5 extends to deceptive conduct in connection with *any* securities transactions, covered or uncovered, and found that *Troice* would not "significantly curtail the SEC's enforcement powers." 571 U.S. at 393-94. This Court also dismissed the dissenting Justices' concerns that *Troice* would subject investment advisers, accountants, and brokers to abusive class-action suits under state law, explaining: "[T]he *only* issuers, investment advisers, or accountants that today's decision will continue to subject to state-law liability are those who do not sell or participate in selling securities traded on U.S. national exchanges." *Id.* at 390.

The Ninth Circuit's interpretation of *Troice* cannot be reconciled with this Court's admonitions. Like *Zandford*, *O'Hagan*, and *Dabit*, the facts alleged here do not involve any dispute over covered versus uncovered securities, and there is no question Respondents had ownership interests in covered securities involved in the alleged scheme. Indeed, the entirety of Respondents' relationship with Edward Jones was centered on investments in national securities markets, and Respondents' claims rest on the financial advisers' alleged duties surrounding investment recommendations for accounts with covered securities. Respondents alleged transactions involving the assets in those accounts to further the alleged scheme. Given this, the broad standard under *Zandford*, *O'Hagan*, and *Dabit* controls to bar Respondents' state-law claims, and *Troice* does not "modify" that conclusion. 571 U.S. at 387.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND RECURRING.

A. The Ninth Circuit's Decision Conflicts With SLUSA's Language and Upsets Congress's Regulatory Scheme.

1. The Ninth Circuit's narrow interpretation of SLUSA's nexus prong is inconsistent with the Act's language and policy objectives. First, "in connection with" is most naturally read as indicating a broad relationship. This Court has consistently recognized that the phrase is understood to have an expansive and flexible construction, and that interpretation also reflects the SEC's longstanding view. *See, e.g.*, *Dabit*, 547 U.S. at 85-86; *Zandford*, 535 U.S. at 819-20. As observed in *Dabit*, "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key

phrase – 'in connection with the purchase or sale' – into SLUSA's core provision." 547 U.S. at 85.

Interpreting "in connection with" to instead require inducement or a direct causal link, as the Ninth Circuit did below, contradicts this plain meaning of the phrase. Much like the Fifth Circuit recognized in addressing *Dabit*'s "coincide" test, linking "in connection with" to inducement "unnecessarily imports causation into a test whose language ('coincide') specifically disclaims it." *Roland v. Green*, 675 F.3d 503, 519 (5th Cir. 2012), *aff'd*, *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). If Congress had wanted to require a causal connection between the alleged deception and a securities transaction, it could have so stated – and it would not have chosen the naturally broad phrase "in connection with."

2. Tethering SLUSA's "in connection with" prong to a causal test is also inconsistent with the statutory structure because it reads the "material fact" element out of the statute. *See* 15 U.S.C. § 78bb(f)(1)(A) (requiring a "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"). Under the approaches of the First, Third, and Ninth Circuits, *every* alleged deception that satisfies the "in connection with" prong would necessarily be "of a material fact" because it would be significant to someone's decision to purchase or sell a particular covered security. *See* Pet. App. 26a. This interpretation renders the "material fact" element surplusage. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *City of Chicago v. Fulton*, 141 S. Ct. 585, 591

(2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (editorial marks omitted)).

3. The Ninth Circuit's narrow interpretation of the "in connection with" prong also upsets the carefully designed regulatory scheme governing the markets and the securities industry. Along with the PSLRA, SLUSA "is designed to prevent persons injured by securities transactions from engaging in artful pleading or forum shopping in order to evade limits on securities litigation that are designed to block frivolous or abusive suits." *Holtz*, 846 F.3d at 930 (citing *Dabit*, 547 U.S. at 81-84); *see also Dabit*, 547 U.S. at 86. Congress in enacting SLUSA could not have intended to allow plaintiffs to take a second bite at the apple by permitting state-law securities class actions to proceed merely because the plaintiffs *omit* allegations that they relied on alleged deceptive conduct in engaging in securities transactions (i.e., transaction causation). If plaintiffs cannot plausibly allege reliance, their claims are barred by the PSLRA, *see Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021), and SLUSA was enacted precisely to prevent plaintiffs from using state law to evade that bar.

Thus, a narrow construction of the nexus requirement, like the Ninth Circuit's below, contravenes SLUSA's intent by allowing securities claims framed under state law to proceed. *See Holtz*, 846 F.3d at 930-31 ("Allowing plaintiffs to avoid [SLUSA] by contending that they have 'contract' claims about securities, rather than 'securities' claims, would render [SLUSA] ineffectual, because almost all federal securities suits could be recharacterized as contract suits about the securities involved."). For example, under the Ninth Circuit's approach, claims based on self-interested and deceptive conduct allegedly harming investment accounts or relationships fall beyond SLUSA's reach. Yet, "[t]he sort of situation . . . in which one party to a contract conceals the fact that it planned all along to favor its own interests[] is a staple of federal securities law." *Id.* at 932-34. Following the PSLRA, plaintiffs filed precisely these types of state-law actions, and they were well-within what Congress sought to preclude under SLUSA. *Cf. Ex parte AmSouth Bancorporation*, 717 So. 2d 357 (Ala. 1998) (pre-SLUSA state-law action challenging bank conduct in pushing investments); *Wallace v. Smith Barney, Inc.*, No. 09-96-100 CV, 1997 WL 137412 (Tex. Ct. App. Mar. 27, 1997) (pre-SLUSA state-law action challenging account roll-overs); *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454 (Md. Ct. App. 1997) (pre-SLUSA state-law action challenging broker's retention of order-flow payments).

Indeed, this case well illustrates the danger of a narrow interpretation of the "in connection with" language. The Ninth Circuit held the requirement not satisfied in an action alleging both federal securities and state-law claims premised on *the exact same* conduct, where: the parties' relationship was centered on securities transactions; Respondents alleged a violation of a duty owed to clients; the alleged scheme could only be effectuated "through the sale of the[] assets"; Edward Jones allegedly conducted further trades to conceal the deception and "justify" the fees; and the alleged conduct affected the value of an account that exists solely for investment in securities. *See* Pet. App. 4a-8a, 26a-28a. While the securities laws "must not be construed so broadly" as to reach "every common-law fraud," the conduct alleged here is no ordinary "common-law fraud." *Zandford*, 535 U.S.

at 820, 825 n.4 (explaining securities laws would not encompass garden-variety fraud such as theft and conversion). Covered securities are at the very heart of Respondents' allegations.

B. This Case Presents A Recurring Issue Requiring This Court's Review.

1. The impact of the Ninth Circuit's decision is not limited to this single class action – or to SLUSA alone. The Ninth Circuit's narrow approach to SLUSA preclusion and the "in connection with" prong threatens to have a wide-reaching impact on the securities industry and circumscribe the SEC's authority to enforce the prohibitions of the federal securities laws, thereby harming investment advisers and investors themselves.

a. As the *Troice* dissent feared, the Courts of Appeals' decisions holding that *Troice* significantly altered the "in connection with" standard will subject "those who advise, counsel, and otherwise assist investors" to potentially abusive class actions in state court. 571 U.S. at 400-01 (Kennedy, J., dissenting). Under these decisions, plaintiffs may pursue large state-law class actions alleging deceptive conduct implicating duties within the investment-advising relationship or affecting the value of investment accounts. Such claims address investor confidence in the securities industry and fall well within Congress' goals underlying the federal securities laws. *Zandford*, 535 U.S. at 819, 822-23. Allowing the state-law class actions to proceed outside the context of federal law undermines Congress' intended reforms in the PSLRA and SLUSA.

The conflict in the Courts of Appeals further undercuts the uniformity Congress sought to achieve.

The Ninth Circuit's approach below, along with that of the First and Third Circuits, allows claims to survive – and extensive discovery to proceed – in actions that would be barred under the *Dabit* standard applied in the Seventh and Eighth Circuits. These include, among others, claims based on alleged schemes inducing clients to choose a particular investment vehicle or adviser; claims alleging schemes regarding adviser duties and investment accounts; allegations of misconduct in managing discretionary accounts like those addressed in *Zandford*; and claims based on undisclosed conflicts of interest impacting trustees' investment decisions. As a result, national firms like Edward Jones face inconsistent law in different parts of the country, opening the door to opportunistic forum shopping by plaintiffs.

b. The Ninth Circuit's decision is especially pernicious because the "in connection with" language not only defines SLUSA's scope, but also establishes the reach of *investor* protections under § 10 (b) and Rule 10b-5. Thus, the Ninth Circuit's cramped interpretation of that requirement threatens to weaken government authority to safeguard investors and the securities markets. Unlike private suits, SEC actions under § 10(b) and Rule 10b-5 do not require a showing of reliance or loss causation regarding a specific investment decision. By interpreting "in connection with" to require a significant impact on a particular investment decision, by someone other than the alleged wrongdoer, the approach of the First, Third, and Ninth Circuits essentially imports the reliance and loss-causation concepts into all securities actions. Nothing in *Troice* mandates or approves such a restriction of the SEC's authority, and there is no support for the suggestion this Court accomplished such a sea change in the scope of the federal securities laws *sub silentio*.

2. The decision below also could unduly restrict the interpretation of statutes beyond the context of securities actions. For example, courts look to § 10(b) cases in interpreting similar "in connection with" language in the Commodities Exchange Act, 7 U.S.C. §§ 6(a), 6b, and the criminal fraud provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1348. *See, e.g.*, *Tatum v. Legg Mason Wood Walker, Inc.*, 83 F.3d 121, 123 n.2 (5th Cir. 1996) (CEA); *Kearney v. Prudential-Bache Sec. Inc.,* 701 F. Supp. 416, 424 (S.D.N.Y. 1988) (CEA); *United States v. Hussain*, 972 F.3d 1138, 1146-47 (9th Cir. 2020) (criminal securities fraud provision). Thus, the Ninth Circuit's decision not only threatens to limit SEC enforcement under the federal securities laws but also to narrow the reach of commodities statutes and criminal securities fraud.

3. Finally, this case presents a strong vehicle for clarifying SLUSA's scope and resolving the conflict regarding the interpretation of "in connection with" after *Troice.* The Ninth Circuit clearly reached the issue presented, and it was not only dispositive, but the only question addressed by that Court. The issue is well-suited for this Court's review, and guidance is critically needed on this exceptionally important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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