NO. 21-552

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the class action limitations of the Securities Litigation Uniform Standards Act (SLUSA) do not apply to Plaintiffs' fiduciary duty claims concerning an annual management fee for securities merely being held in an account and not "in connection with the purchase or sale of a covered security," as required by 15 U.S.C. § 78bb(f)(1)(A)?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Edward Anderson, Raymond Keith Corum, Jesse Worthington and Colleen Worthington (collectively, "Anderson), and members of the putative class for which they serve as lead plaintiffs, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The Securities Litigation Uniform Standards Act (SLUSA) prohibits certain class actions when the underlying misconduct occurs "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). However, where the basis for the class action does not coincide with the "purchase or sale of a covered security," SLUSA has no application. The Ninth Circuit's decision in this case applies this well-established truism and provides no basis for review of its decision. Under the facts of this case, the Ninth Circuit's application of this Court's precedents would not differ from that of any sister circuit.

Petitioners nonetheless attempt to fit this case within some semantic disagreement between several circuits that arises from different views about the effect of the use of the term "materiality" in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), and this Court's earlier use of the term "coincide" in *Merrill Lynch, Pierce, Fenner & Smith*

Inc. v. Dabit, 547 U.S. 71 (2006). Yet, that disagreement does not affect the outcome of this case. The Petition, then, does little more than seek an advisory opinion in this Court. Regardless of narrow differences in the views expressed by the various circuits on the "materiality" and "coincide" issue, the management fee being charged to Anderson and similarly situated clients of Edward D. Jones & Co., L.P. is an annual assessment that is incurred irrespective of whether a covered security is purchased or sold. Equally important, Anderson's breach of fiduciary duty claims against Petitioners for their failure to conduct a suitability analysis prior to transferring clients' assets from commission-based accounts into fee-based accounts does not involve any purchase or sale of a covered security but exists irrespective of any transaction involving securities that has taken place or may take place in the future.

The disagreement among the circuits and its irrelevance to the resolution of the appeal in this case was acknowledged by the Ninth Circuit. It stated that there are some cases where application of "SLUSA's class action bar is not clear and may require further elaboration by our court or the Supreme Court," but held that this case does not present an opportunity to address that question because "Edward Jones's alleged breach of its fiduciary duties [alleged in the complaint] was clearly not 'in connection with the purchase or sale of a covered security.'" Pet. App. 15a-16a (quoting 15 U.S.C. § 78bb(f)(1)(A).

For that reason, the Petition does not present a vehicle for this Court to provide further guidance on the scope of SLUSA's coverage or when a breach of fiduciary duty coincides or is material to a purchase or sale, because no purchase or sale is even remotely implicated when a financial adviser like Petitioner Edward D. Jones & Co. ("Edward Jones") fails to undertake a suitability analysis before recommending that its clients change their account type from a commission-based to an annual fee-based account.

The members of this putative state-law class are investors who adhere to a long-term "hold" philosophy for the securities in their portfolio. When Edward Jones only charged commissions on sales or purchases, the fees generated were small. The lawsuit alleged that Edward Jones pushed members of the putative class into an annual management fee arrangement that generated larger payments than the commission-based fee structure in a manner that breached state-law fiduciary duties – specifically, the conduct of a suitability analysis that would allow clients to evaluate the full implications of a switch of account type, namely, from commission-based accounts into fee-based accounts. In this respect, like the plaintiffs in *Troice*, where this Court held that SLUSA did not apply, this case does not concern any "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." 571 U.S. at 388. It is thus plainly outside the scope of SLUSA and presents no substantial, recurring question for this Court to resolve.

Moreover, rather than present this Court with an opportunity to resolve a circuit split, the Petition asks this Court to expand SLUSA well beyond its text and *any court's* construction of it to reach these facts. Such a request, however, is misdirected because such a request is properly addressed to Congress, which would need to amend SLUSA to accomplish Edward Jones's goal.

COUNTERSTATEMENT OF THE CASE

A. Factual Background.

Respondents in this putative class action, led by lead plaintiff Anderson, placed their investments under the management of Edward Jones, a financial services firm. Anderson and his co-plaintiffs were, as acknowledged by Edward Jones, "buy-and-hold clients," who maintained their investments with "little to no trading each year." Pet. App. 4a-5a. Edward Jones provided a suitable home for Respondents' investments because it "provided its clients free financial advice, only charging them on a per trade basis." Pet. App. 5a.

In 2008, Edward Jones adopted a flat annual asset management fee that applied without respect to the number of transactions a client had and would range from 1.35% to 2%, in addition to administrative fees, based on the value of assets under management. Pet.

App. 5a. Anderson moved his account from the commission-based to the fee-based system.[1] Although Edward Jones provided its clients certain disclosures in connection with the fee-based accounts, it provided the disclosures without first conducting any suitability analysis and after recommending that the clients switch from commission-based accounts into fee-based accounts. Pet. App. 6a. Moreover, these disclosures, consisting largely of a generic brochure, did not provide any information to its clients regarding whether the transfer from commission-based into fee-based accounts was appropriate for the client. *See* Pet. App. 5a. Edward Jones's recommendation to its client, including Anderson and the putative class members, that they switch into fee-based accounts was untethered to the purchase or sale of securities.

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[1] The Petition mischaracterizes the transfer of the accounts from one fee system to another as the "sale of assets," Pet. 8, as though the change in fee system also involved the purchase different investments. As the Ninth Circuit correctly explained, however, the assets were moved whole "from commission-based to fee-based accounts," and it was the recommendation to move to a different fee arrangement without a suitability analysis, not any particular investment strategy or any purchase or sale that provides the gravamen of the Plaintiffs' claim. Pet. App. 5a, 7a, 27a. The Ninth Circuit further held "Plaintiffs do not allege that they bought or sold different assets in those fee-based accounts. Additionally, Edward Jones does not point to any evidence in the record to prove that it sold any covered securities on Plaintiffs' behalf after they transferred to fee-based accounts." Pet. App. 28a.

B. Procedural History

Anderson filed this action in March 2018, which was dismissed without prejudice, and the operative second amended complaint (SAC) on July 29, 2019. Pet. App. 32a, 6a. The SAC alleged stand-alone claims for violations of federal securities laws, and stand-alone state law claims that included claims for breach of fiduciary duty. The stand-alone state-law claims were pleaded separately and did not incorporate by reference any of the claims for violations of the federal securities laws. Anderson alleged in the stand-alone breach of fiduciary duty claims that Financial Industry Regulatory Authority (FINRA) Rule 2111 may be used as evidence of industry standards and practices when pursuing a breach of fiduciary duty claim under state law. Pet. App. 6a. Anderson further alleged in that claim that FINRA Rule 2111 creates a standard so that broker-dealers "ensure that fee-based accounts are only recommended to those clients for whom they are suitable; as such accounts tend to be more expensive for clients who engage in little to no trading activity." Pet. App. 6a. Anderson also alleged that Edward Jones incentivized and pressured its employees who served as financial advisers to switch clients to fee-based accounts, in violation of Missouri and California law. Pet. App. 6a.

The separately pleaded claims for alleged violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and the corresponding Securities and Exchange Commission Rule 10b-5 did not allege that the Rule 10b-5 cause of action had a "connection between [Edward Jones's] misrepresentation or omission and the purchase or sale of a security." Pet. App. 9a (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014)).[2]

The district court did not address whether Plaintiffs' breach of fiduciary duty claim involved alleged promises that were the "in connection with" the purchase or sale of covered securities. Pet. App. 9a. Although the district court did hold that Plaintiffs' *breach of contract* claims involved alleged promises that were "in connection with" the purchase or sale of covered securities, the breach of contract claims, unlike the breach of fiduciary duty claims, "were not based on a lack of suitability analysis, but instead on the allegation Edward Jones never intended to provide and did not provide the additional services purportedly warranting the fees imposed in' the fee-based accounts." Pet. App. 9a n.3.

The district court dismissed all claims with prejudice. It held that the federal and state causes of action were based on the same underlying allegations of misconduct in failing to conduct a suitability

[2] Edward Jones also asserts that "Respondents further alleged that, after the transfer, Edward Jones conducted certain trades on their behalf in the accounts" and that those trades were pretextual in a deceptive attempt to "justify its fees." Pet. 9. Rather than evince a connection with a transaction, the Ninth Circuit correctly held that "[t]his specific allegation appears to be irrelevant to Plaintiffs' fiduciary duty claims." Pet. App. 27a.

analysis for the new fee arrangement and thus all were barred by SLUSA, which it said denied the court subject-matter jurisdiction, based on its reading of Ninth Circuit precedent. Pet. App. 36a.

Anderson appealed only the district court's dismissal of his state law claims for breach of fiduciary duty and not the dismissal of his claims under federal securities laws. The Ninth Circuit reversed. It faulted the district court for failing to address whether the lack of a suitability analysis met the "in connection with the purchase or sale of a covered security" requirement under 15 U.S.C. § 78bb(f)(1)(A) for either the fiduciary duty claims or the claims under securities laws. Pet. App. 9a. It held that the "presence of a federal securities cause of action does not mechanically bar the plaintiff from pursuing a state law class action in the same complaint." Pet. App. 13a. It further held that although "Plaintiffs' fiduciary duty claims cannot proceed as a class action if those claims give rise to a Rule 10b-5 claim" under SLUSA, that does not mean that an invalid 10b-5 claim necessarily blots out an alternative theory under state law that is not about the purchase or sale of securities. Pet. App. 14a-15a.

While acknowledging that some "unsuccessful 10-5 claims" remain within SLUSA's ambit, and the law about where that line is drawn may be somewhat hazy, the Ninth Circuit held that this case did not provide an opportunity to demarcate those differences because "Edward Jones's alleged breach of its fiduciary duties was clearly not 'in connection with the purchase or sale of a covered security.'" Pet. App. 15a-16a.

A petition for rehearing or rehearing en banc was denied May 14, 221. Pet. App. 52a.

C. Statutory Background.

Congress enacted the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4, to stem "'perceived abuses of the class-action vehicle in litigation involving nationally traded securities.'" *Dabit*, 547 U.S. at 81. In pertinent part, the PSLRA "modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066-67 (2018).

To reach state-filed class actions that involved identical allegations concerning the purchase or sale of covered securities, Congress enacted SLUSA. *Dabit*, 547 U.S. at 82. SLUSA barred certain class actions "based upon the statutory or common law of any State or subdivision thereof" from being "maintained in any State or Federal court by any private party" when the allegations involved either a "misrepresentation or omission of a material fact" or the use "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) (emphasis added). The enactment constituted a reflection of congressional intent to "protect[] the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 547 U.S. at 78.

REASONS FOR DENYING THE PETITION

The Petition describes a modest open question concerning SLUSA that the Ninth Circuit correctly recognized did not affect this case. The plain text of SLUSA governs cases that allege that the underlying misconduct occurred "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). However narrowly or broadly courts may read that phrase, it simply does not figure in this matter, and therefore provides no opportunity for this Court to resolve any conflict that might exist, or even opine on the proper approach to that question.

The Ninth Circuit recognized that the reach of SLUSA's class action bar in cases that coincide with the purchase or sale of a covered security "may require further elaboration by our court or the Supreme Court," but in careful and no uncertain terms concluded that this case, involving a breach of fiduciary duty with respect to switching clients to an onerous annual management fee that does not vary on the basis of any transactions that may occur "was clearly not 'in connection with the purchase or sale of a covered security.'" Pet. App. 15a-16a. Because the Petition essentially asks this Court to re-write the statute to reach fact patterns that Congress eschewed, the Petition is misdirected to this Court and cannot satisfy the criteria for certiorari.

I. The Decision Below Faithfully Applies this Court's Relevant Decisions.

A. The Decision Below Does Not Conflict with *Dabit* or *Troice*.

Edward Jones asserts that this Court's decisions in *Dabit* and *Troice* broadly imposed SLUSA coverage for allegations that have even the most attenuated and theoretical relationship to the purchase and sales of covered securities. Instead, this Court engaged in a careful analysis of what Congress wrought by enacting SLUSA, and this case easily falls on the side of the line this Court drew for matters unrelated to a securities transaction when it used the word "coincide" to describe the necessary relationship.

If Edward Jones's argument were valid, every action taken by a financial services company or adviser would be related to the purchase or sale of covered securities simply because that is the business those defendants are in, regardless of the subject of the dispute. *Dabit* refutes that stance when it makes clear that the action within SLUSA's coverage must coincide with a purchase and sale so that they are not independent acts. Changing a fee structure, where purchases and sales do not figure in the fees assessed, does not trigger SLUSA's coverage under *Dabit*.

When one member of the securities industry sought to give *Dabit* a broader reading, *Troice* made clear that the mere mention of a covered security in a manner that did not implicate its purchase or sale is insufficient to invoke SLUSA. Thus, neither decision, contrary to Edward Jones's claims, support an approach to this case different from that adopted by the Ninth Circuit.

1. Dabit's reasoning supports the decision below.

The *Dabit* lawsuit alleged that Merrill Lynch disseminated misleading market research for the purpose of manipulating stock prices. 547 U.S. at 75. It injured the plaintiff-brokers by giving a falsely rosy picture to the stocks that they and their clients held, causing them to hold onto those stocks longer than they otherwise would have and resulting in significant market losses and lost clients. *Id*. at 75-76.

In holding SLUSA applicable to these claims, this Court first noted that there was no dispute that the "securities at issue in this case are 'covered' within the meaning of [SLUSA]." *Id*. at 84. While this Court found that a narrow interpretation of the "in connection with" language "would not have been unreasonable" and such a construction would have found the requisite connection "only when the plaintiff himself was defrauded into purchasing or selling particular securities," this Court adopted a "broader interpretation." *Id*. at 85. It explained that, under that construct, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else" so that the deception is not of an "identifiable purchaser or seller" but is still connected to the purchase or sale of any security,' not deception of an identifiable purchaser or seller. *Id.*

Here, that connection is utterly lacking. An annual management fee is charged whether any purchase or sale of a covered security ever takes place. And changing the way that a client is charged *to hold* their portfolio at Edward Jones does not affect the market or "coincide" with purchases or sales. Thus, nothing in *Dabit* even suggests that this matter fits within SLUSA's prohibitions.

2. *Troice Confirmed the Inapplicability of SLUSA to this Case.*

In *Troice*, the plaintiffs alleged that they purchased uncovered securities that they were falsely told were backed by covered securities. Pointedly, they did "not allege that the defendants' misrepresentations led anyone to buy or to sell (or to maintain positions in) covered securities." *Troice*, 571 U.S. at 381.

Troice held 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.* at 387. In so holding, the Court specified that it was not modifying *Dabit*. *Id.*

Troice further explained that "the Act focuses upon *transactions* in covered securities." *Id.* (emphasis added). In addition, this Court said that SLUSA's language, requiring "misrepresentation or omission of a material fact" or "other forms of deception" "in connection with the purchase or sale of a covered security" "suggests a connection that matters." *Id.* And, "a connection matters where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security." *Id.*

The construction adopted by *Troice* reflects a textualist approach that reflects the care Congress took avoid interference with "state laws that seek to provide remedies to victims of garden-variety fraud," while keeping liability under the federal securities laws within its proper and intended scope. *Id.* at 391.

Like *Dabit* before it, *Troice* makes plain that SLUSA's reach does not cover matters that do not lead people to buy or sell covered securities. The emphasis on "transactions" is the consistent theme between the two cases.

Here, Anderson did not purchase or sell securities in reliance upon or in any relation to the change in the fee structure Edward Jones induced for managing his portfolio. He also did not refrain from any transaction in connection with the changed fee structure. Indeed, "Plaintiffs do not allege that they would have made or not made any particular trades had Edward Jones conducted a suitability analysis." Pet. App. 7a. Anderson engaged in no transactions in which the fee structure figured. Instead, the fee structure simply defined the way in which Edward Jones was paid, annually, irrespective of any purchases or sales. The Ninth Circuit's decision, then, cannot conflict with this Court's decisions in *Dabit* and *Troice*, which define SLUSA's scope and take the "in connection with" statutory language as seriously as the Ninth Circuit did. The case thus presents no important and recurring question warranting the exercise of this Court's discretion to review.

3. The other SLUSA cases decided by this Court also do not conflict with the decision below.

Edward Jones also argues that the Ninth Circuit's decision in this case conflicts with *S.E.C. v. Zandford*, 535 U.S. 813 (2002), and *United States v. O'Hagan*, 521 U.S. 642 (1997). In doing so, Edward Jones makes the exact same arguments this Court entertained and rejected in *Troice*.

Both cases, as *Troice* observes, "involved a victim who took, tried to take, or maintained an ownership position in the statutorily relevant securities through 'purchases' or 'sales' induced by the fraud." 571 U.S. at 389. It further noted that both "concerned a false statement (or the like) that was 'material' to another individual's decision to 'purchase or s[ell]' a statutorily defined 'security' or 'covered security.'" *Id.* at 393 (citing *Dabit,* 547 U.S. at 75-77; *Zandford,* 535 U.S. at 822; *Wharf (Holdings) Ltd. v. United Int'l Holdings,* *Inc.*, 532 U.S. 588, 590-92 (2001); *O'Hagan,* 521 U.S. at 655-57; and *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 10 (1971)).

None addressed circumstances where the purchase and sale of covered securities was not at issue. For example, in *Zanford*, the defendant had induced customers to let him invest their money in the stock market, sold their securities, and pocketed the proceeds. 535 U.S. at 815, 820. In other words, there was a direct connection between the fraud and the sale of covered securities.

Of moment to this case, *Zandford* cautioned against reading the "in connection with" language "so broadly as to convert any common-law fraud that happens to involve securities into a violation of § 10(b)." 535 U.S. at 820. It therefore put the brakes on a wholesale construction of the kind urged by Edward Jones that would turn any fraud in violation of state law into a federal securities matter simply because the fraudster is in the business of purchasing and selling securities when no purchase or sale figured in the dispute. Plainly, then, the Ninth Circuit did not reach its unanimous decision in conflict with *Zandford*.

Edward Jones cites *Zandford* because it contends that, contrary to the mandate it derives from *Zandford,* the Ninth Circuit "refused to consider the *entire alleged scheme* in analyzing the 'in connection with' prong." Pet. 22 (emphasis added). However, the "entire alleged scheme" language appears nowhere in the *Zandford* opinion but comprises spin Edward Jones places on it.

Instead, this Court clearly explained its reasoning quite differently:

> each sale was made to further respondent's fraudulent scheme; each was deceptive because it was neither authorized by, nor disclosed to, the Woods. With regard to the sales of shares in the Woods' mutual fund, respondent initiated these transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities.

Zandford, 535 U.S. at 820-21. This Court, then, held that the fraud at issue could not be disaggregated from the sale of covered securities, which would satisfy the coincide/materiality standard.

Edward Jones also claims that the allegations made by Anderson also cannot be disaggregated. It says that "securities transactions were a critical part of the alleged scheme" because "Respondents did not suffer any alleged harm until the accounts were transferred through the asset sales" into fee-based accounts. That claim was rejected by the Ninth Circuit because assets of the proposed class were moved whole "from commission-based to fee-based accounts" and did not involve the purchase or sale of different investments. Pet. App. 5a, 7a. Even so, it is critical to recall that the alleged fiduciary breach that forms the basis for this case – the invitation to move to a fee-based account with a prior suitability analysis – happened well even that alleged transfer that Edward Jones calls a sale of assets. Pet. App. 28a n.9.

Edward Jones claims a further inconsistency exists between the Ninth Circuit and *Zandford* because the Ninth Circuit, as one of the rationales it used, said the "deception did not significantly impact Respondents' decisions to purchase or sell a particular security." Pet. 23 (citing Pet. App. 16a-20a). Yet, to ignore that undisputed fact would be to ignore this Court's post-*Zandford* decision in *Troice*, where this Court similarly defined "in connection with" to concern a "decision by one or more individuals (other than the fraudster) to buy or to sell a "covered security." *Troice*, 571 U.S. at 387. This Court additionally held that that definition was consistent with its prior decisions, including *Zandford*. *Id*. at 388. Thus, in contrast to Edward Jones's representations, the Ninth Circuit would have deviated from this Court's precedents only if it had not followed *Troice's* teachings, which fully support its holding in this case.

O'Hagan, Edward Jones's other allegedly conflicting case, also fails to cast doubt on the Ninth Circuit's decision. *O'Hagan* was a criminal action where the defendant was charged with insider trading in violation of § 10(b) and Rule 10b–5. It did not involve SLUSA's ban on state-based class actions.

Edward Jones asserts in a scant description of the case that this Court did not consider, as the Ninth circuit did, whether the fraud was "material to a decision by one or more individuals (other than the fraudster) to buy or sell" securities. Pet. 24 (citing Pet. App. 17a). Of course, that language about materiality to a purchase or sale by someone other than the fraudster comes directly from *Troice*. *See* 571 U.S. at 387. To claim that the Ninth Circuit was wrong to use materiality at all is to claim that *Troice* was wrongly decided, which is not a question Edward Jones presented in this case below or to this Court. Instead, it becomes self-evident that the Petition's claim that the Ninth Circuit deviated from this Court's holdings is nothing but a mirage.

II. Edward Jones Conjures Up a Circuit Conflict that Has No Bearing on this Case.

Edward Jones attempts to fabricate a circuit conflict over slightly different takes on how closely the purchase or sale of a covered security must be to fall within SLUSA's scope, but that debate has no bearing on this case because Anderson's claims exist without any relation to a purchase or sale and do not even relate to any instrumentality that might be used in a future purchase or sale. Instead, the Anderson complaint focuses on the fee arrangement and fee charges for his account to sit without any transaction occurring at Edward Jones. And, the damages claimed, the difference in costs incurred by the annual fee arrangement, have nothing to do with any transactions.

To be clear, under the prior transaction-fee arrangement, Anderson would only pay a fee to Edward Jones when a security was purchased or sold. However, the account itself was otherwise free, which means it did not generate much income for Edward Jones. The complaint alleged that Edward Jones then concocted a scheme to change the fee arrangement so that it would receive an annual management fee based on a small percentage of the funds held. The result was that Edward Jones would not depend on sales to rack up its fees but would be paid without regard to purchases and sales even if no transactions took place. It is that fee-charging scheme that forms the basis of this case – and securities transactions play no role, as the Ninth Circuit held.

None of the circuit decisions Edward Jones cites conflict with that analysis. It relies on two circuits, the Seventh and Eighth, to claim otherwise, but the assertion does not withstand scrutiny.

Edward Jones relies primarily on *Goldberg v. Bank of America*, 846 F.3d 913 (7th Cir. 2017) (per curiam), for its claim. There, a bank provided "custodial accounts that clients used to invest in securities." *Id.* at 915. Each evening, any remaining cash balance in the accounts would be swept up or invested by the bank in a mutual fund previously chosen by the client. The bank would then sell the mutual fund shares whenever the "customer needed the money to make other investments or wanted to withdraw cash." *Id*. Unknown to the clients, the bank was paid a fee by some mutual funds based on the balances it transferred to the funds, and that fee was retained by the bank, rather than paid into the custodial accounts. *Id*. The bank never notified customers about the fee or its retention of it. *Id*.

A putative class action alleged that the hidden fee the bank received violated the contractual arrangement made with the bank resulting in the custodial accounts having less value than they otherwise would have. *Id*. The Seventh Circuit had no difficulty, relying on *Dabit* and *Troice* in a short opinion, to conclude that the "Bank's omission was in connection with a purchase or sale of a 'covered security.'" *Id*.

A brief textual analysis stated:

> [SLUSA] does not say what kind of connection must exist between the false statement or omission and the purchase or sale of a security; the statute asks only whether the complaint alleges "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security". [Plaintiff]'s complaint alleged a material omission in connection with sweeps to

> mutual funds that are covered securities; no more is needed.

Id. at 916.

Nothing in the opinion suggests that the Seventh Circuit would reach a different conclusion in this case about SLUSA's relevance. It, just like the Ninth Circuit, read the text of SLUSA. Relying on that text, the Ninth Circuit held that because the complaint in this case is about a fee arrangement that did not involve a transaction of securities – unlike the sweep arrangement in *Goldberg* – SLUSA was simply inapplicable.

The other Seventh Circuit case cited by Edward Jones, *Holtz v. JPMorgan Chase Bank*, 846 F.3d 928 (7th Cir. 2017), also displays no conflict. At issue were allegations that the defendant breached its fiduciary duty to its customers when the bank incentivized its employees "to place clients' money in the Bank's own mutual funds, even when those funds have higher fees or lower returns than competing funds sponsored by third parties." *Id*. at 929. Using the same straightforward analysis evident in *Goldberg*, the court held that the material omission in how it handled the *purchase* of mutual funds fit SLUSA's "in connection with" requirement. *Id*. at 930. Nothing in the opinion suggests that the Seventh Circuit would handle this case differently from the Ninth Circuit.

Edward Jones's invocation of an Eighth Circuit case fairs no better in failing to create a circuit split.

Zola v. TD Ameritrade, 889 F.3d 920 (8th Cir. 2018), involved putative class allegations that the defendant "breached its duty of best execution when it routed client orders to buy and sell securities to trading venues that paid TD Ameritrade top dollar for its order flow." *Id*. at 922. Edward Jones eschews the obvious relevance of purchases and sales in the fact pattern to emphasize that the Eighth Circuit held that *Troice* did not change the standard declared in *Dabit* and claims that the Ninth Circuit disagreed. Pet. 16 (citing *Zola*, 889 F.3d at 922). Even if true, which Respondents assert overplays what the Ninth Circuit did, the disagreement has no material impact on the decision below.

Zola held that "[t]here is no dispute that [the class representatives] purchased or sold 'covered securities'" and those purchases were at the heart of the lawsuit. 889 F.3d at 926. Here, in contrast, no transactions are at issue, only the fees charged for holding a static account at Edward Jones. Again, as with the Seventh Circuit cases the Petition cites, there is no indication that the Eighth Circuit would decide this case differently from the Ninth Circuit.

III. The Case Comprises a Poor Vehicle for Review of the Question Presented.

Respondents take no position on whether the Question Presented provides a certworthy question for this Court's consideration in an appropriate case for two reasons. First, the Question Presented has no relevance to the disposition of this case. Second, it is not clear that the alleged difference between "coincide" and "material" as used in this Court and the circuits causes any different results in cases that actually involve transactions of covered securities. Certainly, this Court did not believe a difference existed when it handed down *Troice*. *See* 571 U.S. at 387.

As the Ninth Circuit acknowledged, there may be some unnecessary play in the joints about SLUSA's scope when the connection with securities transactions becomes more indirect, but this case does not provide an opportunity to draw those lines because "Edward Jones's alleged breach of its fiduciary duties was clearly not 'in connection with the purchase or sale of a covered security.'" Pet. App. 15a-16a.

To reach the question the Petition advances in a manner that does not simply amount to an advisory opinion, some securities transaction must have occurred in violation of a fiduciary duty or based on an omission of material fact. The switching of the fee arrangement for a fundamentally inert account has no gravitational pull on the purchase or sale of covered securities and thus stands outside SLUSA's reach.

IV. The Decision Below is Correct.

The Ninth Circuit's decision in this case applied the plain text of the statute to conclude that there was no connection between the complaint about the changed fee structure for holding accounts at Edward Jones and the purchase or sale of a security. That unremarkable conclusion is consistent with cases across the country that have looked at the same or similar issues.

Indeed, the Ninth Circuit had previously held as much in *Banks v. N. Tr. Corp.*, 929 F.3d 1046 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1243 (2020). Edward Jones presents nothing in its Petition that should render this case more certworthy than *Banks* was.

In *Banks*, the defendant made the breathtaking claim that fee arrangements were "'inextricably intertwined' with the investment claims." *Id.* at 1055. The Ninth Circuit rejected the linkage, stating that the "fee claims also lack any plausible relationship to covered securities" because "[u]nlike the investment claims [also made in that case], Banks' fee claims do not allege conduct in relation to any securities transactions." *Id.* That conclusion about that aspect of the case did not consume even a paragraph in the petition subsequently filed – perhaps because the conclusion was unassailable.

In *Banks*, the Ninth Circuit took solace in the similar decision about fee overcharges issued by the Third Circuit. In *Taksir v. Vanguard Grp.*, 903 F.3d 95 (3d Cir. 2018), the Third Circuit held that SLUSA did not bar investors' overcharging claims against their broker because the overcharges were "not the result of a material misrepresentation about securities transactions, but rather a contractual breach ... tangentially related to the securities transactions." *Id*. at 99.

Here, the connection to securities transactions is not even attenuated, as the annual management fee in dispute is charged irrespective of any transactions.

To reach a different result from the decision below, this Court would have to conclude, contrary to every decision it has made or that any circuit has made, that the fact that the defendant is in the business of securities transactions renders any contractual breach or fraud to be connected to a securities transaction, even if no transaction occurs or is contemplated within the dispute. Such a result would re-write SLUSA in a manner that Congress consciously avoided to make sure SLUSA would not "interfere with state efforts to provide remedies for victims of ordinary state-law frauds." *Troice*, 571 U.S. at 391. *Troice* establishes that this Court will not intrude on federalism by expanding SLUSA beyond its intended scope. It should not review this case to deviate from that path.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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