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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Respondents concede that the Courts of Appeals disagree over the proper standard for applying SLUSA's "in connection with" requirement, 15 U.S.C. §78bb(f), in light of this Court's decisions in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), and *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). Opp. 1, 2, 19. Contrary to Respondents' suggestion, this conflict was at the heart of the Ninth Circuit's decision in this case. Respondents did not allege a mere change to the fee system applied to their accounts at Edward Jones, and the Ninth Circuit did not apply *Dabit*'s coincide standard. Rather, Respondents alleged securities transactions to transfer assets and justify management fees, and (at Respondents' request) the Ninth Circuit applied a materiality standard it derived from *Troice* to hold that SLUSA did not apply. The acknowledged circuit conflict is thus squarely implicated.

Nor do Respondents make any real effort to address the inconsistency between this Court's decisions and the Ninth Circuit's misapplication of *Troice*. The Ninth Circuit's causal requirement cannot be reconciled with the approach in *Dabit*, *S.E.C. v. Zandford*, 535 U.S. 813 (2002), or *United States v. O'Hagan*, 521 U.S. 642 (1997). And interpreting *Troice* to mandate such a result in a case involving *covered* securities ignores the text and context of that decision. Respondents' contrary assertions misstate this Court's decisions and simply parrot the Ninth Circuit's approach without explaining how it can be reconciled with this Court's precedents.

Respondents do not and cannot dispute the importance of the question presented. Opp. 23. Interpreting "in connection with" to require a direct connection between the alleged deception and specific investment decisions threatens a far-reaching impact on the securities industry, the SEC, and investors. *See* Br. for Securities Indus. & Fin. Markets Ass'n, *et al.* as *Amici Curiae*, at 7-9.

Instead, Respondents assert that this case is not a proper vehicle to address the conceded circuit split because the Ninth Circuit held that the breach they alleged was not in connection with securities transactions. Opp. 23-24. But that assertion simply assumes the answer to the question presented. It does not dispel the need for guidance on the proper interpretation of SLUSA. And in any event, Respondents' assertion is refuted by their own allegations and the Ninth Circuit's decision.

This conceded conflict over how to apply the "in connection with" standard is clearly implicated, and this Court's review is needed to ensure the proper interpretation of SLUSA and the federal securities laws and to protect the uniformity Congress sought to achieve.

ARGUMENT

I. RESPONDENTS ACKNOWLEDGE THE EXISTENCE OF A CIRCUIT CONFLICT REGARDING THE APPLICATION OF "IN CONNECTION WITH" AFTER *TROICE*.

Respondents acknowledge the existence of a growing split among the Courts of Appeals regarding the proper standard after *Troice* for applying SLUSA's "in connection with" requirement to state-law claims alleging deceptive schemes involving covered

securities. Opp. 1, 2, 19. Although Respondents attempt to downplay the significance of this split and argue that a specific securities transaction—which they contend is absent here—is required even under *Dabit*'s broader "coincide" test, Respondents' arguments sidestep the conflicting legal standards in the circuits that would have resulted in a different outcome here and misstate the nature of the state-law claim alleged. Given this conceded disagreement among the circuit courts, this Court's review is needed to resolve the proper scope of SLUSA preclusion and restore uniformity on this important question under the federal securities laws.

At the outset, Respondents are wrong in asserting that the Ninth Circuit applied *Dabit*'s "coincide" test or that the admitted "open question" regarding "[h]owever narrowly or broadly" courts interpret the "in connection with" standard after *Troice* was "irrelevan[t]" to the decision below. Opp. 2, 10. The interplay between *Troice* and *Dabit* was central to the Ninth Circuit's analysis. The Ninth Circuit repeatedly stressed that, in the court's view, *Troice* had "shifted" the understanding of SLUSA's "in connection with" prong away from *Dabit*'s broad "coincide" test and "clarified" that the language required a material connection between the alleged omission or misrepresentation and an investment decision regarding a particular covered security. Pet. App. 16a-20a. It analyzed the allegations of Respondents' complaint "[w]ith this materiality requirement in mind." Pet. App. 20a. Applying this more demanding materiality test, the Ninth Circuit concluded the alleged deception regarding the purported lack of suitability analysis was material only to the decision to transfer accounts, was not "intrinsic to the investment decision itself" and,

therefore, was not materially connected to a securities transaction. Pet. App. 22a-24a. As the Ninth Circuit made clear, the court did not apply *Dabit*'s "coincide" test, and Respondents' suggestion otherwise is contrary to the court's stated analysis. Pet. App. 20a ("The Alleged Lack of Suitability Analysis Was Not Material" (emphasis omitted)). Respondents' argument that the outcome would have been the same under *Dabit* reflects sheer conjecture.

Respondents further contend that the conflict regarding *Troice*'s impact on SLUSA's "in connection with" standard is not implicated in this case. Respondents' argument is based on immaterial factual differences between the cases, when it is the divergent *legal standards* applied by the circuit courts that warrant this Court's intervention. These different legal standards do not reflect merely a "semantic disagreement," Opp. 1, and the state-law claims the Ninth Circuit allowed to proceed would have been precluded in other courts.

As Respondents concede, both the Seventh and Eighth Circuits continue to apply *Dabit*'s "coincide" standard to define the required connection between the alleged deception and a securities transaction. *See, e.g.*, *Goldberg v. Bank of America*, 846 F.3d 913 (7th Cir. 2017) (affirming the district court's dismissal under SLUSA of state-law claims by a trustee alleging that a bank retained secret fees from mutual funds when clients' cash balances were swept into the funds at the end of each day). Respondents assert, incorrectly, that the Seventh Circuit in *Goldberg* also "rel[ied] on . . . *Troice*." Opp. 21. Not only did the Seventh Circuit *not* rely on *Troice* in analyzing whether SLUSA's "in connection with" prong had been satisfied, the court affirmatively stated that

Troice "*does not affect [the court's] conclusion*, because customers were dealing directly with covered investment vehicles." 846 F.3d at 916 (emphasis added). Instead, the court reasoned, *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.*

Contrary to Respondents' arguments, and the Ninth Circuit's analysis below, the Seventh Circuit applied *Dabit* to analyze whether the requisite connection was satisfied. The court in *Goldberg* also rejected the plaintiffs' arguments—akin to those raised by Respondents here—attempting to limit SLUSA's preclusive scope to only a narrow set of deceptions "involv[ing] the price, quality, or suitability of a[] security." 846 F.3d at 916. Thus, unlike the Ninth Circuit, which applied what it took to be *Troice*'s analytical "shift," the Seventh Circuit applies a different legal standard in analyzing SLUSA's "in connection with" prong. *See also Holtz v. JPMorgan Chase Bank*, 846 F.3d 928, 933-34 (7th Cir. 2017) (relying on *Dabit* and *Zandford*, and not citing *Troice*, in finding "in connection with" prong satisfied related to alleged omission by bank regarding mutual funds).

Like the Seventh Circuit, the Eighth Circuit continues to apply *Dabit* and has declined to require a causal nexus between the alleged deception and a particular securities transaction. Respondents therefore concede, as they must, that in *Zola v. TD Ameritrade*, 889 F.3d 920 (8th Cir. 2018), which involved an alleged breach of the duty of best execution, "the Eighth Circuit held that *Troice* did not change the standard declared in *Dabit*." Opp. 23; *see Zola*, 889 F.3d at 926. Respondents' attempt to

distinguish *Zola* on the ground that purchases of covered securities "were at the heart of the lawsuit" is unsupported by the court's analysis. Opp. 23. The Eighth Circuit held that the "in connection with" prong did *not* require that the alleged deception induce a purchase or sale of a covered security. 889 F.3d at 926. Instead, the court reasoned, the alleged breach was connected with *every* trade in covered securities because the defendant benefitted every time it executed an order for its "'duped customer.'" *Id.*

Respondents' additional contention that the circuit split is not implicated because "there is no indication" the Seventh or Eighth Circuits would have found the "in connection with" requirement satisfied in this case under *Dabit*'s broader standard, Opp. 22-23, overlooks the relevant issue: Those courts apply different legal standards to analyze the required transactional nexus under SLUSA. Respondents' speculation about how they might have applied those legal standards to the facts alleged in Respondents' complaint provides no basis to sidestep the conflict in legal approaches, much less to conclude that the Ninth Circuit's extensive discussion of the relationship between *Dabit* and *Troice* was entirely meaningless.

Respondents do not contest that—unlike the approaches of the Seventh and Eighth Circuits—the First and Third Circuits conclude that *Troice* significantly narrowed *Dabit*'s "coincide" test even where it is undisputed the alleged deception related to covered securities. These courts, much like the Ninth Circuit below, impose a more demanding threshold materiality inquiry onto SLUSA's "in connection with" prong. Pet. 17-19 (citing *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)). Far from an inconsequential "semantic disagreement," the application of these divergent legal standards among the circuit courts has led to real differences in how district courts apply SLUSA, *id.* at 21—a point that Respondents neither dispute nor even address. Given this acknowledged split, this Court's review is needed to provide guidance to the lower courts on how to properly apply *Troice* and *Dabit*.

II. THE NINTH CIRCUIT'S INTERPRETATION OF *TROICE* CONFLICTS WITH THIS COURT'S DECISIONS.

Not only is there a clear circuit conflict, but the decision below adopted the erroneous side of that dispute. Interpreting "in connection with" to require a causal connection in a case involving covered securities, as the Ninth Circuit did, cannot be reconciled with this Court's decisions defining the "in connection with" requirement. Respondents' attempts to distinguish these cases are conclusory and refuted by this Court's holdings and analysis.

For example, this Court did not mandate a direct causal connection between the alleged deception and a securities transaction in *Zandford*. Instead, this Court considered the context of the alleged scheme and held it was sufficient if the scheme and sales "coincide." 535 U.S. at 820-22. Respondents argue *Zandford* involved a more direct link between the alleged deception and securities transactions, but the claims in *Zandford* lacked the type of causal connection mandated by the Ninth Circuit's decision. The alleged conduct did not impact the client's investment decisions regarding particular securities, the value of any securities transaction, or the market.

535 U.S. at 815-16, 818. Rather, this Court held it was sufficient that the sales furthered the fraudulent scheme and noted that the alleged conduct implicated investor confidence in the securities industry. *Id.* at 822-23. The same is true here.

Respondents' arguments otherwise rest on an attempt to recharacterize their own allegations and a truncated view of the relevant events. As explained below, Respondents' own complaint makes clear that their allegations are not simply about a change in fee structure, and the alleged scheme is not limited to the "invitation" to transfer to fee-based accounts. Rather, the claims are based on Respondents' investment strategy and the different investment account options made available to them, and Respondents alleged that asset sales and related transactions were made to complete the purported scheme. Pet. App. 6a-7a, 28a-29a n.10. Similarly, Respondents' suggestion that the "invitation" to transfer to fee-based accounts is the only relevant consideration ignores essential elements of a claim for purported breach of fiduciary duty—including proximate causation of damages—which here would necessarily depend upon their allegations concerning the actual transfers of assets.

Zandford's discussion of frauds that are not "in connection with" a securities transaction also undermines Respondents' arguments. *Zandford* explained that the "coincide" standard does not "transform every breach of fiduciary duty into a federal securities violation," and offered examples of the types of breaches that would fall outside the scope—such as when a "broker embezzles cash" or "induce[s] his client into a fraudulent real estate transaction." 535 U.S. at 825 n.4. Such frauds are not "in connection with" securities transactions simply

because the broker works in the securities industry. But those examples are a far cry from the allegations here. Respondents' claims are intertwined with investment advice, services, and strategy, and they allege asset sales and transactions to complete the purported scheme. Under *Zandford*, such allegations satisfy the "in connection with" requirement.

Respondents concede that this Court in *O'Hagan* did not interpret "in connection with" to include an implied materiality requirement. Opp. 19. All that Respondents can muster is that *O'Hagan* involved "§ 10(b) and Rule 10b-5," and the "language about materiality . . . comes directly from *Troice*." *Id.* at 18-19. But that only confirms the conflict between the Ninth Circuit's decision and this Court's decisions: "in connection with" means the same thing in each securities law. *See Dabit*, 547 U.S. at 86. And *Troice* should not be interpreted, as the Ninth Circuit did, to import an implied materiality requirement into SLUSA that does not exist in § 10(b) and Rule 10b-5.

Respondents have no answer for the inconsistency between the Ninth Circuit's standard and this Court's decisions in *Dabit* and *Troice*. Rather than address the Petition's arguments in any depth, Respondents offer conclusory assertions and misstate this Court's holdings. Respondents argue the decision below does not conflict with *Dabit* because the applicable fee mechanism lacks the requisite connection to a securities transaction and the allegations do not coincide with purchases or sales. Not only is this argument based on the untenable characterization of Respondents' allegations, but Respondents' simple repetition of the *Dabit* standard does not add anything to the analysis.

Respondents further assert that *Dabit* and *Troice* emphasized transactions and held that SLUSA applies only to conduct that induced people to buy or sell a covered security. Respondents offer no support for their proclamations, and there is none. *Dabit* did *not* require that the alleged conduct induce a particular investment decision or impact the market. 547 U.S. at 85-86. Indeed, *Dabit* expressly rejected such a requirement and, instead, chose the broader "coincide" standard. *Id.* Nothing in this Court's decision suggests "coincide" incorporates a direct causation requirement, and such an interpretation is contrary to the plain meaning of the term. *Roland v. Green*, 675 F.3d 503, 519 (5th Cir. 2012), *aff'd Troice*, 571 U.S. 377 (noting that "coincide specifically disclaims" causation (punctuation omitted)). Moreover, like *Dabit, Troice* did not emphasize "transactions." *Troice* focused on the distinction between covered and uncovered securities and whether the plaintiffs had an ownership interest in a covered security. 571 U.S. at 386-93. Respondents do not address that aspect of *Troice.*

At bottom, Respondents argue the decision below cannot conflict with *Zandford*, *Dabit,* or *O'Hagan*, because the Ninth Circuit applied *Troice*, which stated that its holding was consistent with this Court's prior decisions. Respondents miss the point. As explained, the Ninth Circuit interpreted *Troice* in a manner well beyond that contemplated by this Court and untethered to the context of that decision. It is that erroneous interpretation that conflicts with this Court's prior decisions. The mere fact that the Ninth Circuit discussed *Troice* does not render its standard consistent with any of the other decisions defining the scope of the "in connection with" prong.

III. RESPONDENTS' VEHICLE ARGUMENTS ARE CONTRARY TO THE CLAIMS PLEADED AND ARGUED BEFORE THE LOWER COURTS.

After conceding the circuit split and failing to address clear conflicts with this Court's cases, Respondents argue that this case does not warrant review because the difference between *Dabit*'s coincide standard and the Ninth Circuit's implied materiality test "has no relevance to the disposition of this case," which—they say—would come out the same under either standard. Opp. 23-24.

That was not the Ninth Circuit's view. The court below began its analysis by holding that SLUSA's "in connection with" element requires materiality, noted what it took to be this Court's "shift[ing]" interpretation of that phrase, and rejected pre-*Troice* precedent applying *Dabit*'s coincide test simply because the cases predated *Troice*. Pet. App. 16a-20a, 24a n.7, 25a n.8. None of that would have been remotely necessary if the different legal standards make no difference here.

Respondents' arguments rest on an attempted reframing of their claims in direct contradiction to the case that Respondents themselves presented to the lower courts. As pleaded, Respondents' claims involved much more than a simple change to the fee system applied to their accounts at Edward Jones. Respondents alleged that Edward Jones "cause[d] them to transfer their assets from commission-based accounts to fee-based" accounts, which they alleged was done "through the sale of these assets." CA9 ER60. They also alleged that Edward Jones conducted "Phantom Trades" in their fee-based accounts "in a deceptive effort to justify its fees." CA9 ER61. And they alleged that "[t]he commission-

based/fee-based dichotomy is critical and material to any investment decision." CA9 ER83. Respondents acknowledged before the Ninth Circuit that, under *Dabit*, alleged misrepresentations need only "coincide with a securities transaction." CA9 ECF No. 15, at 32. But, in light of the complaint's allegations, Respondents insisted that *Troice* imposed a materiality test that required a causal connection between the alleged conduct and a decision to buy or sell a covered security. *Id.* at 1-2, 15-16, 32, 35. Having persuaded the Ninth Circuit to apply that interpretation of SLUSA, Respondents cannot contend that it makes no difference now.

Respondents' allegations—and the Ninth Circuit's decision—plainly implicate the question of how "narrowly or broadly," Opp. 10, to interpret the "in connection with" language that has divided the Courts of Appeals. This Court should grant certiorari, clarify the proper interpretation of SLUSA, and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 29, 2021