

1 at 11:06 a.m.

2 APPEARANCES:

3 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

4 Petitioners.

5 ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor

6 General, Department of Justice, Washington, D.C.; for

7 United States, as amicus curiae, supporting

8 Petitioners.

9 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Maryland; on

10 behalf of Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 12-79, Chadbourne &
5 Parke v. Troice in the consolidated cases.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 The Stanford Ponzi scheme was a massive
12 fraud, but that fraud clearly included material
13 misrepresentations about transactions in covered
14 securities. The complaints in this case bear that out.

15 Plaintiffs allege specifically that their
16 money was -- there were misrepresentations about how
17 their money would be invested in covered securities,
18 that the misrepresentation was material, and that,
19 indeed, the security of the underlying investments was
20 the most important factor in securing Plaintiff's own
21 investments in the CDs.

22 JUSTICE KENNEDY: Well, I -- I think there's
23 some problem with whether or not this was covered
24 securities, but I also think that's not in the case
25 anymore. Am I correct in the latter assumption?

1 MR. CLEMENT: Well, I certainly agree with
2 you in the latter assumption, Your Honor, which is both
3 lower courts decided this on the case that the complaint
4 specifically -- referred to covered securities
5 specifically enough.

6 I don't want to belabor the point because I
7 don't think it's in the case, but I will say I do think
8 there's a reason that that was not a contested issue
9 because, if you think about the securities that were
10 referred to, strong multinational corporations, major
11 international banks, those are companies that are traded
12 on U.S. national exchanges.

13 Also, if you get into the details of the
14 record, I mean, I think if you want to look at
15 something, Joint Appendix page 746 is an attachment to
16 the Willis complaint. And there, there's a reference to
17 the New York Stock Exchange, and it's a translated
18 letter to investors, and you can read it more than one
19 way.

20 But I sure think the whole point of that
21 paragraph is to lead the Plaintiffs to think that their
22 stock -- they're buying an interest in stocks that would
23 be traded on the New York Stock Exchange particularly.
24 So --

25 CHIEF JUSTICE ROBERTS: So if -- if I'm

1 trying to get a home loan and they ask you what assets
2 you have and I list a couple of stocks, and, in fact,
3 it's fraudulent, I don't own them, that's a covered
4 transaction, that's a 10b-5 violation?

5 MR. CLEMENT: Well, I don't know, Mr. Chief
6 Justice. That would depend on the answer to a question
7 that I don't think the Court has to decide in this case,
8 which is whether a reference to your stockholdings would
9 be sufficient to -- to come with --

10 JUSTICE KAGAN: Well, suppose you say you're
11 going to pay off the loan by selling some stock
12 holdings, eventually.

13 MR. CLEMENT: Yeah, I think that probably
14 would be covered, Your Honor, and I don't think that's
15 any great surprise. I mean, this Court held in a case
16 called Reuben against the United States that, if you
17 pledge securities that are -- and tell the banks that
18 they're valuable and they, in fact, aren't, that that's
19 covered by the securities law.

20 In that case, it wasn't just in connection
21 with, it was actually considered a constructive sale or
22 transfer of the securities.

23 JUSTICE SCALIA: If they were covered
24 securities, right? I mean, you're -- you're pledging
25 covered securities to the bank and make a

1 misrepresentation about them, right?

2 MR. CLEMENT: Well, that's right. I'm just
3 saying, though, that I don't think the fact that you can
4 have a misrepresentation in connection with a loan
5 application or something like that is all that
6 surprising in the sense that the way that both 10b,
7 10b-5, and SLUSA are structured.

8 The "in connection with" requirement can
9 take something that might otherwise be plain fraud, and
10 if there's a misrepresentation in connection with a
11 security or a covered security, that makes it securities
12 fraud. But that --

13 JUSTICE BREYER: My goodness. Are there
14 cases where they brought such things? I mean, every
15 State has laws that forbid fraud. And mortgages are
16 probably -- and loans are probably made in the billions
17 every year. All it takes is someone to say, on his
18 sheet of listing assets, to have a covered security and
19 say, don't worry, I'll hold these, I'll hold them.

20 Or don't worry, I will sell this one and buy
21 that one. Don't worry, I'll buy another one. I
22 won't -- I won't put up the security of my sprinkler
23 system. I will sell the sprinkler system and use it to
24 buy a -- a covered exchange.

25 I guess if those fall within the securities

1 laws, we would have expected to see billions of actions.
2 Why not?

3 MR. CLEMENT: Well, with -- with respect, I
4 don't think, in most of these cases, anything is going
5 to particularly turn on that. I also think -- I'm happy
6 to answer --

7 JUSTICE BREYER: I know that's what you
8 think, but I need to know why you think it. If there
9 are billion -- if I'm right in my -- what I just said.

10 MR. CLEMENT: Because there are lots of
11 cases where whether you can prosecute a fraud or
12 securities fraud is not going to make much difference.
13 You can go at it either way. There are circumstances --
14 there are really two things that are at issue here. One
15 is --

16 JUSTICE BREYER: Tell me a case where the
17 SEC has ever -- there may be such cases -- but what is
18 done is somebody has simply tried to get a loan and he
19 put on that sheet of paper listing assets a covered
20 security. And he said, I intend to keep it. Or he
21 said -- you know, I will buy some more, or I'll sell it
22 and buy some more or -- you know, or put in your three
23 things.

24 Just list the case where they've ever
25 prosecuted that as a securities fraud or private people

1 have. After all, it's beneficial, sometimes, for
2 private people. What are the cases?

3 MR. CLEMENT: Your Honor, I don't know that
4 there are cases directly on point. But let me be clear.
5 Our theory here does not, by any means, necessarily have
6 to extend to those holder situations. What is at issue
7 here is not just a misrepresentation about holdings of
8 securities. It is -- they are misrepresentations about
9 covered securities transactions.

10 And more particularly, they are false
11 promises to purchase covered securities for Plaintiffs'
12 benefit. And there are SEC cases that are brought under
13 those circumstances and, as well, there should be
14 because, when you sell something, whether it's a
15 noncovered security or something else based on a
16 misrepresentation about covered securities, you trigger
17 the interests of the SEC and SLUSA in a distinct way.

18 JUSTICE KAGAN: What if people reach a
19 prenuptial agreement, and as part of the prenuptial
20 agreement, they agree that, in a year, one party to the
21 marriage is going to sell as many shares of Google stock
22 and buy a home with it. Is that covered by the
23 securities laws now?

24 MR. CLEMENT: I would think probably not, at
25 the end of the day, but I also would say that this is so

1 far removed from that. I mean, first of all --

2 JUSTICE KAGAN: Well, how is it removed from
3 that? Because it has the same structural features,
4 which is it's a misrepresentation about what you're
5 going to do with securities, but, in fact, does not
6 affect any securities trading. What it affects is a
7 decision to do something else, here, to buy CDs or, in
8 my example, to go get married.

9 MR. CLEMENT: With respect, Your Honor, I
10 think this Court has already crossed the bridge. You
11 don't have to effect the specific transaction in which
12 you are -- the fraud is alleged to be associated with.
13 So you have cases like O'Hagan, for example, where the
14 actual transaction on the -- on the exchange is not
15 sullied with the fraud and the victim of the fraud
16 doesn't even trade, the holder of the confidential
17 information --

18 JUSTICE KAGAN: In all of our cases, there's
19 been something to say when somebody can ask the
20 question, how has this affected a potential purchaser or
21 seller in the market for the relevant securities? And
22 here, there's nothing to say.

23 MR. CLEMENT: With respect, I disagree with
24 the premise. I don't think --

25 JUSTICE KAGAN: Somebody, not necessarily

1 the victim of the fraud, but somebody has to have had
2 some transaction in the market. It's the kind of
3 misrepresentation that would affect someone in making
4 transactions in the covered market. How would this do
5 that?

6 MR. CLEMENT: Well, the only way in which
7 there isn't that kind of transaction here is because the
8 fraud was bigger. As we point out in the briefs, if you
9 imagine that this was a thing where they said, look,
10 we're going to purchase multinational corporations; and,
11 instead, they purchase domestic corporations.

12 Well, then, there would be a transaction
13 that would not have otherwise occurred on the market and
14 domestic transactions that would have been perfectly
15 analogous to the kind of normal transaction that took
16 place in Bankers Life and or in Zandford in the market.
17 And yet, the fraud was sufficiently associated with it.

18 And I don't think this Court wants to say
19 that the only frauds that are not in connection with are
20 the really big ones --

21 JUSTICE BREYER: Well, what is the case?
22 What is the specific case, private or SEC, that comes
23 the closest -- I grant you there is none direct -- but
24 comes the closest to Justice Kagan's hypothetical, if
25 you marry me, I will sell my IBM stock?

1 MR. CLEMENT: I don't think there's a
2 particularly close case because, A, I think the SEC has
3 better things to do.

4 JUSTICE BREYER: Try --

5 MR. CLEMENT: And I think privately --

6 JUSTICE BREYER: What is the SEC's closest
7 case -- but they may be better at answering this. What
8 is their closest case to the horrors that they foresee
9 if you lose?

10 MR. CLEMENT: Well, I -- I think, probably,
11 I would start with the Richard Line case, which is cited
12 on page 21 of their brief. And what that case shows is
13 that you can have frauds in connection with covered
14 securities that affect things that are either not
15 covered securities or, in that case, are nothing at all.

16 Mr. Line was very clever. He took people
17 who were interested in having their kids go to college
18 and needed financial aid, and he said, I'll take your
19 assets from you, and they'll be -- they'll be mine, I'm
20 not going to give you anything in return, not a covered
21 security, nothing, because the whole point of this is to
22 get your assets off your books.

23 And what I'll do is I'll invest those in the
24 market, make a bunch of money, and in four years, when
25 you're no longer worried about financial aid, I'll

1 return your principal and some of the proceeds. And --

2 JUSTICE ALITO: Well, in Justice -- Justice
3 Kagan's hypothetical and in some of the others, it seems
4 that it's really irrelevant in whether the assets in
5 question are securities or some other asset. And it's
6 also -- and, therefore, a fortiori, it's irrelevant
7 whether -- if it involves securities, whether they're
8 covered or they're not covered.

9 Now, would you be willing to concede that,
10 in that situation, where it really -- all you're talking
11 about is an asset. It doesn't matter whether it's a
12 covered security or a -- a Rembrandt or gold, that, in
13 that situation, 10(b) doesn't reach the case?

14 MR. CLEMENT: I think that -- I would agree
15 with that, Justice Alito, but for a slightly different
16 reason than you may be imagining, which is I think one
17 of the mistakes that can be made here is to ask in
18 connection with -- to do all the work. And the statute
19 has multiple requirements, including a materiality
20 requirement.

21 And as your question suggests, if you're
22 making a misrepresentation and the whole point of it is
23 to just tell somebody that, look, I have wealth, or I
24 have sort of assets, I don't know that the specific
25 nature of them makes any difference.

1 But in a case like this, the whole point of
2 this fraud was to take a noncovered security and to
3 imbue it with some of the positive qualities of a
4 covered security, the most important of which being
5 liquidity. And if you look at sort of the underlying
6 brochures here that were used to market this, that's
7 really what this fraud was all about.

8 These --- these CDs were offered as being
9 better than normal CDs because we can get you your money
10 whenever you need it.

11 JUSTICE ALITO: Does it matter that there --
12 apparently, there is not an allegation that there
13 actually were any purchases or sales of covered
14 securities? It says in -- the statute says, "in
15 connection with the purchase or sale of a covered
16 security." And there weren't.

17 There -- I don't believe there's an
18 allegation that they actually were purchased or sold.
19 Does that matter?

20 MR. CLEMENT: It doesn't matter, Your Honor,
21 for the reason I indicated earlier, which is you don't
22 want to draw a line that basically says, look, if you
23 buy different securities than you were supposed to or
24 you sell fewer than you were supposed to, that's
25 covered, but if you're a Madoff, and you go all the way

1 and simply lie about the whole thing and there never
2 were any securities purchases at all, that that's
3 somehow better.

4 JUSTICE ALITO: What's your best case on
5 that?

6 MR. CLEMENT: Well, I think, again, if -- if
7 you want to start with SEC adjudications, again, on page
8 21, there is the Jett adjudication where, again, there
9 was a broker/dealer in that case, and they just made up
10 the trades. They told their employer, you know, look
11 how I've done, look at these great trades. And there
12 just weren't any trades.

13 And of course, all of the Madoff cases -- or
14 a substantial number of Madoff cases fit that -- fit
15 that -- that categorization. It's actually not clear
16 whether this case does because, at the end of the day, I
17 think what's alleged is either there were no purchases
18 or substantially less purchases of covered securities
19 than represented.

20 Nobody has really thought the difference
21 between zero and substantially less made much of a
22 difference in this case. And I would certainly, like I
23 said, suggest that that's the right result because,
24 whatever else is true, you can't somehow have a better
25 fraud that's immune from the SEC, just because you

1 completely made the whole thing up and there were no
2 transactions at all.

3 JUSTICE GINSBURG: Mr. -- Mr. Clement, there
4 are -- Zandford said that "in connection with" doesn't
5 include ever common law fraud that happens to involve
6 covered securities. So can you give us an example of
7 what would not be covered? What fraud involving
8 securities would not qualify as in connection with the
9 sale or purchase of securities?

10 MR. CLEMENT: Sure. Let me start with -- I
11 mean -- with a hypothetical that Zandford used because I
12 think it helps illustrate why, even if coincide is the
13 test, we satisfy it here. What Zandford was really
14 distinguishing is two cases, one where a broker/dealer
15 gets money from a potential client with the purest of
16 intentions and only at a later stage do they say -- you
17 know, I'm kind of below on own payments, I need some
18 money, I'm going to embezzle the funds.

19 And Zandford said, in that context, the
20 fraud and the security purchases are independent events.
21 I don't think anybody would look at this case and say
22 that the misrepresentations about covered securities
23 purchases and the fraud were independent events, nor
24 would anybody say that this isn't a case where, from the
25 very beginning, there was intent by Stanford not to make

1 good on the promise to purchase covered securities on
2 behalf of the plaintiffs.

3 So this is like Zandford itself or Wharf --
4 Wharf Holdings itself, where the fraudulent intent is
5 there at the very moment the transaction takes place.
6 And, again, Wharf Holdings is another example where this
7 Court says, in dictum, that, well -- you know, it would
8 be one thing if they sold the option and only, later,
9 independently decided that they weren't going to perform
10 on the option.

11 But if they had that intent all along, they
12 clearly coincide. Now --

13 JUSTICE SCALIA: I had assumed that the
14 purpose of the securities laws was to protect the
15 purchasers and sellers of the covered securities. There
16 is no purchaser or cover -- or seller of a covered
17 security involved here.

18 MR. CLEMENT: Well, there --

19 JUSTICE SCALIA: It's -- it's a purchaser of
20 not -- not-covered securities who is being defrauded, if
21 anyone. Why -- why would the Federal securities law
22 protect that person?

23 MR. CLEMENT: A couple things, Your Honor.
24 First of all, obviously, the Federal securities laws
25 apply to non-covered securities, as well as covered

1 securities. So the real question here is going to be
2 SLUSA's coverage because, as I said, 10b-5 applies to
3 non-covered securities.

4 Second of all, this Court is well over the
5 bridge about not requiring that it be the plaintiff's
6 own purchases or sales that are what the inquiry focuses
7 on. And that's been true in a whole line of this
8 Court's cases. And in --

9 JUSTICE SCALIA: It doesn't have to be the
10 plaintiff's, but it has to be somebody's.

11 MR. CLEMENT: Well, and here, there are
12 purchases of covered securities. They're the alleged
13 purchases. They're the false promises that I'm going --

14 JUSTICE SCALIA: Nonexistent purchases,
15 right?

16 MR. CLEMENT: Well, as I said, I don't think
17 anything turns on it, but there actually were some
18 purchases. And they --

19 CHIEF JUSTICE ROBERTS: The only element of
20 fraud in there was by the bank itself. They're the only
21 ones whose purchases or sales could be said to have been
22 affected by the misrepresentation. And of course, they
23 can't --

24 MR. CLEMENT: Right, but --

25 CHIEF JUSTICE ROBERTS: -- make any claim on

1 that basis.

2 MR. CLEMENT: Right, Mr. Chief Justice, and
3 that has been the case in other cases as well. The
4 security transactions in Bankers Life, neither the
5 seller nor the buyer of those transactions had -- was
6 affected by -- directly by the fraud. In Zandford,
7 there were security sales. Those security sales --

8 CHIEF JUSTICE ROBERTS: But somebody else --
9 somebody else was, right?

10 MR. CLEMENT: Sure, and -- and the
11 plaintiffs were clearly affected by this fraud.

12 CHIEF JUSTICE ROBERTS: Not by the purchase
13 or sale, right? They were affected, according to your
14 theory, by the fact that, oh, they told us there were
15 these stocks, but the actual purchases and sales, the
16 fraud did not go to the purchase and sales of the
17 covered securities; they went to the CDs.

18 MR. CLEMENT: And, again, that's true, in so
19 many cases. Dabit, the holders didn't purchase or sell
20 at all, but that was okay. O'Hagan, the defrauded party
21 was the company with the confidential information.

22 JUSTICE KENNEDY: Your white light is on,
23 but what is the simplest formulation of your test?
24 If -- if we were to write the opinion your way, what --
25 the test would be?

1 MR. CLEMENT: The simplest -- the simplest,
2 narrowest way to decide this case is to say that, when
3 there is a misrepresentation and a false promise to
4 purchase covered securities for the benefit of the
5 plaintiffs, then the "in connection with" standard is
6 required.

7 If I may reserve my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Goldenberg.

10 ORAL ARGUMENT OF ELAINE J. GOLDENBERG,
11 FOR UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONERS

13 MS. GOLDENBERG: Mr. Chief Justice, and may
14 it please the Court:

15 We agree with the narrow formulation that
16 Mr. Clement just gave, that the issue in this case is
17 that it involves a false promise to purchase covered
18 securities using the fraud victims' money in a way that
19 they are told is going to benefit them and that that is
20 a classic securities fraud. Their question --

21 JUSTICE SOTOMAYOR: So how -- how broad is
22 the word "benefit"? Because that's really what this
23 case comes down to.

24 MS. GOLDENBERG: Well, I think --

25 JUSTICE SOTOMAYOR: Assuming we accepted

1 your narrow test, which wouldn't address every situation
2 that the other circuits have talked about, but let's --
3 let's --

4 MS. GOLDENBERG: I think it's clear that
5 "benefit" isn't restricted merely to ownership of the
6 securities themselves, and I would point to --

7 JUSTICE SOTOMAYOR: Well, that was the
8 Madoff situation, which was different from this one.

9 MS. GOLDENBERG: Well, I don't think the
10 Madoff situation is particularly different from this
11 one. In Madoff, there were feeder funds that people
12 were buying into that were non-covered securities.

13 And what they were being told is that the
14 money that was being put into the feeder fund was then
15 going to go on and be used to purchase covered
16 securities that they, themselves, were not going to have
17 an ownership interest in, but that the benefit of those
18 purchases was going to be passed back to them through
19 this intermediate layer.

20 JUSTICE BREYER: But -- but the -- the case
21 that he says -- I'm quite interested in your reaction to
22 which cases that you've ever brought, this would, if you
23 lose here, would prevent you from bringing, and Line was
24 the one that because mentioned.

25 MS. GOLDENBERG: Yes.

1 JUSTICE BREYER: And in Line, there is a
2 broker who says to a client, give me some money and I
3 will buy some securities on the exchange for you. And
4 they gave him the money, and he didn't. Well, that's
5 directly related to a promise that is going to effect a
6 purchase or sale of a security directly. He's promising
7 someone to buy securities for his account.

8 MS. GOLDENBERG: I actually --

9 JUSTICE BREYER: I don't think that that's
10 this case.

11 MS. GOLDENBERG: Well, I actually think that
12 the Line case is much more analogous to this case than
13 Your Honor is suggesting because what was happening in
14 Line is the -- what the broker said to the victims was,
15 you have children who are going to college, you don't
16 want to have this money around because you want to be
17 able to get financial aid, so give the money to me, and
18 in several years, I will give that money back to you
19 with --

20 JUSTICE BREYER: He didn't say, I will buy
21 them for you.

22 MS. GOLDENBERG: Well --

23 JUSTICE BREYER: And I can understand how a
24 promise to buy securities for you is a promise to a
25 person or a statement that would lead a person to take a

1 position. Whether it's this plaintiff or someone in the
2 world, it would lead someone in the world to take a
3 position.

4 What your opponents say is that is what is
5 present -- not present here; neither the person who is
6 giving the money nor anyone else, with the possible
7 exception of the defendant, is being led by this
8 statement to take a position in a market for, buy,
9 against, sell, or even, if you like, not sell or buy,
10 hold. I'll throw that in.

11 MS. GOLDENBERG: Your Honor, the -- just to
12 return to Line for a moment, and then I'd like to
13 address sort of how the purposes of the securities laws
14 are implicated in a situation like this, in Line, what
15 the victims were told was that they were going to be
16 given the money back after four years had passed, with
17 interest calculated above market rate.

18 So they are not being told that they were
19 going to be given whatever profit is made on a
20 securities transaction, or, as I read Line, although
21 it's slightly sparse on its facts, that they're going to
22 be the owners of the securities or have an ownership
23 interest in any way. And so I do think it is cases like
24 Line that are at the margin --

25 JUSTICE SCALIA: Anyway, Line's not a case

1 of ours, is it?

2 MS. GOLDENBERG: No, it's not, Your Honor.

3 JUSTICE SCALIA: It's not a case of any
4 court, is it?

5 MS. GOLDENBERG: It is an SEC --

6 JUSTICE SCALIA: It's one of your cases.

7 MS. GOLDENBERG: Yes.

8 JUSTICE SCALIA: Right. We don't have to
9 agree with all of your cases, do we?

10 (Laughter.)

11 MS. GOLDENBERG: Certainly not, although we
12 do think that the SEC's expert view in a formal
13 adjudication may warrant some deference. But --

14 JUSTICE KAGAN: So, Ms. Goldenberg, suppose
15 I think that the correct test is something along the
16 lines of what Justice Breyer just said, is -- is this
17 the kind of representation that could affect somebody --
18 It doesn't have to be the victim of the fraud, it can be
19 somebody else, but that could affect somebody's decision
20 to buy or sell or hold covered securities.

21 Can you satisfy that test?

22 MS. GOLDENBERG: Yes, I think so because I
23 think that, here, there is a major effect on investor
24 confidence and investor confidence specifically with
25 respect to covered securities in several different ways.

1 If people see that lies of the kind here,
2 where someone is telling someone else, I'm going to buy
3 covered securities, and it's going to benefit you, are
4 being made and those lies are -- are -- well, that's a
5 fraud on the victims, then I think people are less
6 likely to go to their broker and say, here's some money,
7 go out on the market, and buy me some securities.

8 It's a -- it's a lie that goes to the
9 mechanism by which the securities markets operate, which
10 is the purchases and sales, and it makes it less likely
11 for people to be willing to believe that, when they
12 engage in purchases and sales, that something's really
13 is going to happen, and the person is going to
14 respond --

15 JUSTICE KENNEDY: Well, I mean, if you -- if
16 you went to church and heard a sermon that there are
17 lots of people that are evil, maybe then you wouldn't
18 invest, but I'm --

19 MS. GOLDENBERG: Well, but this is much more
20 particular, again, to the mechanism by which the
21 securities markets operate. And I think another way to
22 look at it is just to imagine the honest version of
23 Stanford.

24 If someone honestly said to CD purchasers,
25 give me your money, and I'm going to put it into covered

1 securities, and people invested in that scheme, then
2 that would pump money into the covered securities
3 markets.

4 But now, people are much less likely to
5 invest in a scheme like that.

6 CHIEF JUSTICE ROBERTS: Well -- but nobody
7 is suggesting that the SEC can't take action with
8 respect to the noncovered securities. So to the extent
9 there's diminished confidence in the securities markets,
10 the SEC has all the tools available to address that.
11 The question is the different one under SLUSA.

12 MS. GOLDENBERG: Well, I think it's true
13 that the SEC would continue to have tools, but I do
14 think --

15 CHIEF JUSTICE ROBERTS: I mean, in fact,
16 I -- this -- it would inspire confidence to the extent
17 that lawyers can bring these actions, as opposed to
18 having them precluded, which is what you're arguing for.
19 I'm sorry I interrupted you.

20 MS. GOLDENBERG: Well -- no, that's fine. I
21 think that this is a very particular effect on investor
22 confidence and the integrity of the markets, which is
23 one of the purposes of the securities laws.

24 And with respect to SLUSA, the purpose of
25 SLUSA is to try to stop people from going around the

1 requirements of the PSLRA and some of the limitations in
2 this Court's decisions, and I think that purpose is --
3 is at issue here as well.

4 I'd also like to talk a little bit, if I
5 could, about the issue that was raised earlier about
6 whether an actual purchase or sale needed to be made, or
7 whether a purported or intended purchase or sale is
8 sufficient.

9 And I think that, practically, from the
10 moment that the '33 and '34 Act went into place, there's
11 been a consensus in the lower courts -- and the SEC has
12 said this as well -- that a purported or intended
13 purchase or sale is sufficient.

14 And it's for the reason that Mr. Clement
15 gave that, otherwise, you have these home run, egregious
16 frauds, where someone is, instead of saying I'm going to
17 buy this less risky thing and then buying a riskier
18 thing, someone says, I'm going to buy securities, and
19 then doesn't buy them at all and absconds with the
20 money, and that that is something -- a situation that
21 has to be -- has to be covered.

22 JUSTICE ALITO: Can I take you back to the
23 test that you think we should apply here?

24 MS. GOLDENBERG: Sure.

25 JUSTICE ALITO: The test that Mr. Clement

1 articulated and that you agreed with seems to amount
2 to -- to saying, when exactly what is alleged here is
3 alleged, that that's -- that that's within 10b or 10b-5,
4 that's not that helpful as a precedent going forward.

5 Now, the test that Justice Breyer suggested,
6 whether something would affect investors' confidence in
7 the securities market, I don't know how we can -- and
8 you say, yes, this would -- that would be met here -- I
9 don't know how we can determine what -- whether
10 something, certainly, of this nature or maybe even
11 further removed, would, in effect -- would affect
12 investor confidence.

13 Somebody might read about this scheme in the
14 paper and say, well -- you know, there's a lot of hanky
15 panky going on with the sale of any kind of securities
16 and CDs, I'm just going to keep cash under my mattress.
17 How do we -- how would we determine that?

18 MS. GOLDENBERG: Well, I -- I think it's for
19 the reasons that I gave earlier, which is that this goes
20 to the purchase/sale mechanism and that we know that
21 people have to have confidence in that order -- in order
22 for the securities markets to work.

23 It may well be that people also -- you know,
24 lack confidence in other things, but that is the thing
25 that's the particular problem and the thing that the

1 securities laws are aimed at. And I know Petitioner --

2 JUSTICE SCALIA: What -- what troubles me,
3 Ms. Goldenberg, is not the problem of our figuring out
4 these economic consequences, but the text of the
5 statute, which says, "in connection with the purchase or
6 sale of one of the covered securities."

7 MS. GOLDENBERG: Yes, Your Honor.

8 JUSTICE SCALIA: There has been no purchase
9 or sale here.

10 MS. GOLDENBERG: Well, there's been a
11 purported purchase.

12 JUSTICE SCALIA: It can't be in connection
13 with a purchase or sale that has never occurred. I
14 mean, it could be have read in connection with the
15 purchase or sale or the promised purchase or sale or the
16 contemplated purchase or sale, but it doesn't. It says,
17 "in connection with the purchase or sale."

18 I don't know how you can make that stick to
19 a situation where there has been no purchase or sale.

20 MS. GOLDENBERG: That's true, Your Honor,
21 but it also doesn't say the consummated purchase or
22 sale, and so I think the purported, intended,
23 consummated, all those things are swept up in the text.
24 And I think that's consistent with the way that you
25 would use the phrase in ordinary life.

1 If I were going to go to my real estate
2 brokers to sell my house, I might gather up a bunch of
3 documents, I might show up at the office at a certain
4 time, in connection with the sale of my house. And even
5 if the sale falls through and there is no consummated
6 contract, I've still done those things in connection
7 with the sale.

8 And as I say, I think courts and the SEC
9 have consistently taken that position, and if it
10 weren't -- if that weren't the case, then egregious
11 frauds would go unremedied, and that would be a
12 tremendous problem.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Goldstein.

15 ORAL ARGUMENT OF MR. THOMAS GOLDSTEIN

16 ON BEHALF OF THE RESPONDENTS

17 MR. GOLDSTEIN: Mr. Chief Justice, and may
18 it please the Court:

19 I would ask you to write an opinion
20 affirming and that adopts the following rule -- and that
21 is that a false promise to purchase securities for one's
22 self in which no other person will have an interest is
23 not a material misrepresentation in connection with the
24 purchase or sale of covered securities.

25 The other side has asked you to adopt a rule

1 that has never been advocated by the SEC in any other
2 proceeding; it's never been advocated, as I understand
3 it, in its briefs in this case; it's never been adopted
4 by any Court ever. And I think there are good reasons
5 for that.

6 Their theory is that what happened here is
7 that there was a promise to buy covered securities that
8 would be for the benefit of someone else. That has two
9 textual flaws, it doesn't comport with the purpose of
10 the statute, and it would have extraordinary
11 consequences.

12 It doesn't -- it doesn't conform to the text
13 of the statute in either of two ways. Covered security,
14 which is what the Plaintiffs here purchased, is a
15 defined term. It is a security, but only the subset of
16 securities that are traded on a national exchange and
17 some of the other additions that would involve, for
18 example, mutual funds.

19 And so Congress didn't say that it was in
20 connection with the purchase or sale of a covered
21 security, if it was a covered security that someone else
22 would get the benefit of.

23 It is -- what has to be bought here is a
24 stock, and instead, what was bought here was a CD. As
25 Mr. Clement says, this is a case of a massive fraud. He

1 could well have said, this is a case of a massive
2 securities fraud, but it was not a case of a covered
3 securities fraud. The Plaintiffs here bought something
4 that Congress specifically excluded from preclusion
5 under SLUSA.

6 The second textual flaw in their position is
7 that --

8 JUSTICE ALITO: I don't understand what the
9 first textual flaw is.

10 MR. GOLDSTEIN: Okay. So --

11 JUSTICE ALITO: What is the jumping off
12 point for this flaw?

13 MR. GOLDSTEIN: The jumping off point is
14 that there -- is the defined term "covered security."

15 JUSTICE ALITO: Right.

16 MR. GOLDSTEIN: So SLUSA only applies if
17 there was a material misrepresentation in the -- in the
18 purchase or sale of a covered security.

19 JUSTICE ALITO: Well, everybody -- the case
20 proceeds on the assumption that the -- that the CDs were
21 not covered securities. The question is whether it's --
22 the "in connection with" requirement is met by the
23 allegation, which is interpreted to mean that there
24 would be future purchases and sales of covered
25 securities.

1 So I'm not sure what -- what you're getting
2 out of the fact that covered securities is a -- is a
3 defined term.

4 MR. GOLDSTEIN: Because Congress asked
5 you -- or told the courts to focus on the question of
6 what the product is, that there was a misrepresentation
7 in the course of the transaction, in the course of the
8 purchase or sale, and that is only a covered security.
9 It is not some other product that has, as a benefit, an
10 interest in a covered security.

11 JUSTICE ALITO: It doesn't say a
12 misrepresentation about the covered security. It says,
13 "a misrepresentation in connection with."

14 MR. GOLDSTEIN: That's actually, I think,
15 Your Honor, a really good point for us because the other
16 side's argument, up till the brief -- excuse me -- up
17 until the oral argument, is that it was a
18 misrepresentation about covered securities that would
19 trigger SLUSA.

20 The problem with their position is that what
21 the Court has always said, when it talked about the
22 definition of "in connection with," is really two
23 things. It has to be flexible. We have to give the SEC
24 the ability to deal with novel frauds. But because,
25 metaphysically, everything is connected with everything

1 else, we're going to have to draw a line. There's going
2 to have to be some limit.

3 And you've pointed out that it's not an
4 easily administered one, but the -- the bulwark, the one
5 thing that stops 10b-5 from getting completely out of
6 control, is that all of the frauds involved are ones
7 that the Court has recognized would have an effect on
8 the regulated market. That was true in O'Hagan; it was
9 true in Zandford.

10 Now, I realize that my friends from the
11 Solicitor General's Office said today, at the podium,
12 that they can imagine that this fraud would have an
13 effect on the regulated market. They did say the
14 opposite in their briefing in the case. Their brief at
15 the cert stage said there was no possibility that there
16 would be an effect on the regulated market.

17 And so this, I -- I imagine --

18 CHIEF JUSTICE ROBERTS: Can you -- can you
19 just give me the page for that?

20 MR. GOLDSTEIN: Yes, sir. The -- it is -- I
21 will get it during the -- it's quoted multiple times in
22 our brief, but my colleagues will get it, if you don't
23 mind, and --

24 CHIEF JUSTICE ROBERTS: Oh, no. It's okay.

25 MR. GOLDSTEIN: It's in the cert pages, at

1 about page 12, I think, but we'll -- I will have it for
2 you in just a moment, please.

3 And they said there is no -- the -- to quote
4 it almost verbatim, there was no prospect that this
5 fraud would have an effect on the covered securities
6 market.

7 The second textual flaw --

8 JUSTICE SCALIA: Well, wait. And -- and if
9 that's -- if that's wrong, you acknowledge you don't
10 win?

11 MR. GOLDSTEIN: No, I do not.

12 JUSTICE SCALIA: All right. Okay. So what
13 difference does it make?

14 MR. GOLDSTEIN: Well, it -- it is a -- as I
15 understood, they're -- they seem to recognize, and if
16 you read, for example, their brief in Zandford, they say
17 that the sine qua non of their ability to determine as
18 the enforcement authority here, that something has a --
19 is in connection with the purchase or sale of the
20 regulated security is whether it would have an effect on
21 the regulated market.

22 They wrote a brief to you saying that and --

23 JUSTICE SCALIA: And you really don't agree
24 with that anyway.

25 MR. GOLDSTEIN: I think that that is their

1 best hope, and I don't think they can satisfy it. We
2 think their authority is narrower still.

3 JUSTICE KENNEDY: What -- what is your
4 position if the broker says, give me \$100,000, and I
5 will buy covered securities, and then he just pockets it
6 and -- and flees?

7 MR. GOLDSTEIN: That is securities fraud, in
8 our view, according to the SEC's administrative
9 position. No court has ever said that -- so that's
10 Justice Scalia's point from the first half-hour.

11 We can -- if that is correct, if the SEC is
12 correct about that, we still prevail because what's
13 happening is the broker is saying, I will purchase for
14 you the covered securities. That's what the Line case
15 stands for.

16 Their brief in --

17 JUSTICE KENNEDY: Well, I don't see how this
18 case is that much different. They say, we were going to
19 invest in CDs, and the CDs will be backed by purchase of
20 the securities that we will purchase for you.

21 MR. GOLDSTEIN: Okay. And so the -- the
22 critical difference, I think, is in the definition of
23 "purchase." And that was going to be the second textual
24 flaw that I was going to point out. And that is we can
25 acknowledge that they would have a much stronger case in

1 the hypothetical that you've described if the covered
2 securities are pledged to back the CDs.

3 This happens, for example, on a margin
4 account. It happens if -- there are lots of times
5 someone will say, I intend to use your money to buy
6 covered securities, to buy stocks, and I am providing
7 those stocks as security for the loan.

8 The reason that's securities fraud is the
9 definition of a purchase includes pledging the --
10 pledging the stocks. That's really important. And it
11 tracks with the Court's holding that "in connection
12 with" reaches as far as frauds that would have an effect
13 on the regulated market.

14 Imagine if I were allowed to say, look, I am
15 going to buy covered securities, and you now hold an
16 interest in them -- an enforceable interest in the
17 stocks. And if that were not securities fraud, the
18 market couldn't function very well because things like
19 margin accounts, you could never have the confidence
20 that you would have the protection of 10b-5.

21 The critical difference, Justice Kennedy, is
22 between two different cases. If -- this case, which is
23 SIB, says, look -- among all of its many
24 misrepresentations -- I will take your money, and I
25 intend to buy covered securities. That gets the -- you

1 know, putting all aside the difficulty of liquid assets
2 versus covered securities, give them their best version
3 of the representation here.

4 But it was only buying it for itself. It
5 did not pledge to sell the assets. It did not give the
6 plaintiffs any interest in them. For example, the
7 interest rate on the CDs was completely independent of
8 the return on those covered securities.

9 JUSTICE GINSBURG: Mr. Goldstein, I take it,
10 from what you said up to now, that you are not defending
11 the Fifth Circuit's test. It called for a determination
12 whether the misrepresentation is the heart or the crux
13 of the complaint.

14 MR. GOLDSTEIN: We -- we do defend that
15 rule. We do not think it's the best ground to decide
16 the case, and I will explain what I mean by that.

17 The Fifth Circuit undertook to articulate a
18 rule that would govern all cases in which someone
19 purchased something that was supposedly invested in
20 covered securities; so including, for example, the
21 Madoff cases, where there was securities fraud. Madoff
22 falsely sold interest in a fund. That's core securities
23 fraud.

24 SIB never sold any securities at all. It
25 only sold CDs. So if the Court believed that the Fifth

1 Circuit was correct, that it was appropriate to decide
2 all of these derivative investments -- if I could,
3 cases -- then we think you need a flexible term like
4 "more than tangentially related."

5 But we think this case stands on its own, on
6 the question of, look, if I promise -- if I sell you
7 something, and I say I am going to take the money and
8 buy CDs for myself, and those CDs have the quality of
9 being liquid -- now, you don't have an interest in the
10 CDs, I am not pledging them to you, so there is no
11 purchase by you of a covered security -- then that is
12 not a securities fraud.

13 And I did want -- want to get --

14 JUSTICE SOTOMAYOR: Well, but that's the
15 Line case where, I am told by the government, you were
16 trying to -- I know that Justice Scalia doesn't think
17 it's important, but I do. Okay?

18 If someone tells me, sell your securities,
19 give me the money, I will buy securities for myself and
20 give you a fixed rate of return later, I think that's in
21 connection with the purchase and sale of securities,
22 even though it's not legally purchased for my benefit.

23 MR. GOLDSTEIN: Okay. Two things about
24 that, Justice Sotomayor. I will say that if -- what I
25 think you were actually told from the podium is that it

1 is unclear from the SEC's administrative opinion whether
2 the persons who gave the money to the broker as an
3 investment were actually given an interest in the
4 securities.

5 It's just not clear from that opinion.

6 There is certainly no SEC holding. Second --

7 JUSTICE SOTOMAYOR: Let's assume they were.

8 MR. GOLDSTEIN: Okay. Then the second thing
9 I would say is the SEC has always been very clear to you
10 that the key part of your hypothetical is that it's a
11 broker. And the SEC has said to you repeatedly, and I
12 will just give this to you from their Zandford brief at
13 page 23.

14 "There is a particularly strong connection
15 between fraud and securities transactions when
16 stockbrokers, like Respondent, misappropriate securities
17 and securities proceeds from brokerage accounts."

18 The key feature is that you can understand
19 why it is that the market can't function if your
20 stockbroker is making promises about buying and selling
21 securities. This is a bank. This is a bank that
22 doesn't issue covered securities in any way because it's
23 a foreign bank. It issues only the non-covered
24 securities that Congress specifically excluded from --

25 JUSTICE BREYER: That's true, suppose -- I

1 think what is difficult to define -- Jay Fisk gets into
2 his horse and carriage, drives up and down Wall Street,
3 and says, "I'm going to buy Union Pacific, I'm going to
4 buy Union Pacific," knowing that people will, in fact,
5 all run out and buy it quickly, and what he really
6 intends to do is, when it comes out, he didn't, he's
7 going to sell outright.

8 Anyway, typical fraud. Now, that is
9 certainly covered.

10 MR. GOLDSTEIN: Yes. That's market
11 manipulation.

12 JUSTICE BREYER: All right. So -- so now,
13 here, what we have is Mr. Stanford, I guess, saying to
14 people, "I'm going to buy securities, I'm going to buy
15 securities." And maybe he didn't.

16 MR. GOLDSTEIN: Yes.

17 JUSTICE BREYER: Just like Jay Fisk.

18 MR. GOLDSTEIN: Sure.

19 JUSTICE BREYER: Okay. So why does the
20 first fall within and not the second?

21 MR. GOLDSTEIN: Because the first completely
22 messes up the stock market and the second one has
23 nothing to do with it. The first --

24 JUSTICE BREYER: You mean, in other words,
25 if they had done exactly the same thing, but with an

1 intent or -- or maybe and the affect of a purchaser of
2 stock or a seller of stock reacting to the statement,
3 then it affects it?

4 MR. GOLDSTEIN: Absolutely, because that's
5 the sine qua non --

6 JUSTICE BREYER: Okay. Where neither of
7 those is present, it doesn't.

8 MR. GOLDSTEIN: That's right.

9 JUSTICE BREYER: Okay.

10 MR. GOLDSTEIN: And it's not --

11 JUSTICE KAGAN: Could -- could you go back
12 to the Madoff case --

13 MR. GOLDSTEIN: Yes.

14 JUSTICE KAGAN: -- because you portrayed it
15 as investors joining into funds that directly held
16 stock, and I thought that it was more complicated than
17 that.

18 MR. GOLDSTEIN: Okay. I -- I will play it
19 out. That was not my intention. The Madoff cases
20 involved the following scenario, and there are diverse
21 ones, and so I caution the course -- the Court about
22 trying to lay down a rule that will govern all those.

23 So Madoff engages in securities fraud.
24 We -- in covered securities fraud. He says, I have this
25 fund; it is invested in stocks. That turns out to be

1 completely untrue. So we know that Madoff engaged in
2 securities fraud.

3 The Madoff cases are about the next
4 generation, the indirect purchasers, and that is people
5 who bought into a fund, and the fund bought into Madoff.
6 Now, those cases have been resolved on two separate
7 grounds that may not be entirely consistent, neither one
8 of which has any implications for our case.

9 Theory number one, and this is by -- in an
10 opinion by Judge Rakoff, just a few weeks ago for the
11 Second Circuit. He says, look, the indirect purchaser
12 cases are covered by SLUSA because I look at SLUSA, and
13 it says, look at the allegation.

14 And the core allegation in those cases is of
15 covered securities fraud. It was that I was deceived, I
16 lost my money, I should say -- because Madoff engaged in
17 securities fraud. He was selling air. He wasn't
18 selling anything at all. That's not this case. SIB
19 sold only non-covered securities.

20 The second way they have been resolved is
21 that you may be said to have -- when you bought into
22 what are called the "feeder funds," that -- that in turn
23 invested in Madoff, you may well have purchased an
24 interest in the Madoff fund itself. And, therefore, you
25 were engaged effectively in the purchase or sale of

1 covered securities.

2 That is clearly on the other side of the
3 line from this case. Nobody contends that we bought
4 anything other than noncovered assets. Now, I have
5 tried to get to the -- to the hypotheticals that the
6 Court put to the -- my friends in the first half-hour.
7 And realize that these --

8 CHIEF JUSTICE ROBERTS: I'm sorry.
9 I'm just --

10 MR. GOLDSTEIN: Yeah.

11 CHIEF JUSTICE ROBERTS: -- about 30 seconds
12 behind you.

13 Nobody contends that you bought anything
14 other than non-covered assets?

15 MR. GOLDSTEIN: Correct.

16 CHIEF JUSTICE ROBERTS: I thought there was
17 an allegation that you were purchasing and selling
18 covered assets. The ones that were misrepresented to be
19 backing CDs.

20 MR. GOLDSTEIN: No, sir. They have not even
21 made that argument. They say that it's enough to
22 trigger SLUSA, that SIB bought something that was said,
23 in some sense -- and I have no idea what the rule is, to
24 be for our benefit or to back our CDs, but the only --
25 it is categorically the case that the only purchase or

1 sale by the Plaintiffs --

2 CHIEF JUSTICE ROBERTS: By SIB.

3 MR. GOLDSTEIN: Yes, yes, sir. Now, this
4 is, of course, a significant step further than the line
5 that already concerned some members of the Court,
6 Justice Scalia, Justice Thomas and the late Chief
7 Justice dissented in O'Hagan, and this is a very
8 significant move further than even that case because the
9 emphasis of the SEC in O'Hagan was that that kind of
10 fraud would have a tremendous effect on the market if --
11 if people didn't -- couldn't be confident that the
12 other -- the person on the other side of the trade had
13 material nonpublic information.

14 Now, returning to the hypotheticals that the
15 Court put to my friends in the first half-hour, realize
16 they're not hypotheticals. They are exactly why the SEC
17 is in the case. The SEC doesn't administer SLUSA. It
18 is concerned that a narrower reading of "in connection
19 with" will affect its ability to administer the
20 securities laws.

21 But you put to the SEC the question, okay,
22 name a case that you've brought in the past 80 years
23 that you could not bring if the Plaintiffs prevail here.
24 Name a case that you, hypothetically, want to bring.

25 JUSTICE KENNEDY: I mean, that's exactly

1 what I would like you to think about for a second
2 because the last words of Ms. Goldenberg of the SEC,
3 well, if you win, it's going to seriously hamper the SEC
4 in combatting fraud.

5 Of course, it wouldn't in a case like this,
6 because they aren't limited by covered securities, they
7 can deal with any security, and they did bring a case
8 here. But they're worried about what you say, that
9 somehow this will narrow their authority, and they quote
10 Line, which is debatable.

11 But assuming that it's debatable, Mr. --
12 Mr. Clement will have a chance to answer this exact
13 question. And so you are saying there are none. And
14 Line is debatable. And, therefore, it would not have
15 hampered them in any case in the past, nor any one we're
16 likely to think of in the future, but for Line, which is
17 somebody's decision over at the SEC, and can be argued
18 that it fits within your definition.

19 Is that really your answer? Or are we going
20 to discover Mr. Clement coming up and saying, you forgot
21 about da, da, da, da, da?

22 MR. GOLDSTEIN: If he does, it'll be the
23 first time. They filed three merits briefs, three reply
24 briefs, the SEC filed a cert stage amicus brief. It
25 filed a merits amicus brief. It has argued orally in

1 front of you. And so far, we haven't found a case.

2 Now, can you -- can I tell you that I can
3 imagine a case that, because of my rule, the SEC can't
4 bring? I can and I think that they shouldn't be allowed
5 to bring it. I'm not saying that our rule has no effect
6 on them. I'm saying it does.

7 But it's the lending cases, it's the
8 prenuptial cases, it's those things that hang over the
9 economy like a loaded gun.

10 JUSTICE GINSBURG: Aren't those rather
11 academic because SLUSA wouldn't be a bar to them anyway,
12 because then that's class actions?

13 MR. GOLDSTEIN: My point -- my point,
14 Justice Ginsburg, I apologize, is not that those are
15 affected by -- that those -- that rule affects SLUSA.
16 It affects the SEC's ability to bring a felony
17 prosecution, despite the rule of lenity on the basis
18 that that's securities fraud.

19 Really understanding the consequence of this
20 case, I'll admit to you, that the effect on SLUSA --
21 this is kind of a one-off case. They haven't identified
22 any other cases like this under SLUSA, so they're
23 adopting a very broad reading of "in connection" to kind
24 of kill a gnat.

25 But the reason that they -- the SEC wants to

1 do it is because it wants an extremely broad reading of
2 "in connection with the purchase or sale." They want to
3 be able to bring a case in which someone is alleged to
4 have purchased a non-security, a house, issued a loan,
5 on the basis of some statement about the liquidity of
6 the fraudster.

7 And that is never a case that's ever been
8 brought before. And so it's true that we would prevent
9 them from doing that, but that's a good thing, not a bad
10 thing. They've had 80 years to say that they need that
11 authority, and they never have.

12 If there is going to be a way in which we
13 lose this case, notwithstanding the foregoing, I think
14 it's going to be Justice Alito's concern; can you
15 articulate a narrower rule in favor of the Petitioners
16 that says it was the feature that they were covered
17 securities that was essential to the fraud.

18 I think we can say, first, that is not in
19 the text of the statute, right? That those words don't
20 appear.

21 JUSTICE ALITO: Well, all that's in the text
22 of the statute is "in connection with," which is
23 open-ended, so I don't know what you're going to get
24 from the text of the statute.

25 MR. GOLDSTEIN: Well, I do think that this

1 was not in connection with the purchase or sale. It
2 certainly wasn't material to any purchase or sale. But
3 the other thing, Justice Alito, is this notion that --
4 that the feature of them being stocks was essential to
5 the fraud would be true in, for example, a loan.

6 If I say to you, I want to get a loan for
7 \$100,000, I promise to buy for myself stocks that I
8 could sell to repay the loan, the only thing that was
9 critical about them is that they were liquid. And
10 remember, that's actually all that SIB said, is that it
11 had liquid assets. That's the only feature of it. And
12 so if we're going to focus on that --

13 JUSTICE GINSBURG: But you're not contesting
14 at this point -- I think both courts below assumed that
15 the assets included stocks that would be traded on the
16 exchange. You're not making the argument that it's
17 not necessarily -- that maybe the portfolio included
18 nothing that was traded on the exchange?

19 MR. GOLDSTEIN: We are not. I will say,
20 however, that the other side has a serious problem of
21 administrability of an opinion in its favor in the
22 following way: Justice Ginsburg, the \$7 billion in
23 assets that SIB claimed to own clearly included some
24 stocks on the NYSE. I think that's perfectly fair.

25 The question is how many? Nobody knows the

1 answer to that. And if you are going to rule for them,
2 the lower courts are going to face cases where a bank
3 says, we have liquid assets as well.

4 JUSTICE ALITO: Can I just be clear on
5 your -- your position on the issue of whether there has
6 to be an actual purchase or sale?

7 MR. GOLDSTEIN: Yes.

8 JUSTICE ALITO: What is your answer? Yes,
9 there must be, or, no, it's not essential?

10 MR. GOLDSTEIN: It is not essential to our
11 position. If you agree -- if you agree with the SEC
12 that there doesn't have to be a purchase or a sale, we
13 still easily win the case. No court has -- I believe
14 that's only been resolved administratively. And so you
15 would have to decide that, in their favor, in order to
16 win the case. In order -- we are not giving up on the
17 question.

18 JUSTICE ALITO: You don't want us to decide
19 the case on that basis?

20 MR. GOLDSTEIN: No.

21 JUSTICE ALITO: You don't want us to issue
22 an opinion that says there has to be a purchase or sale
23 and, therefore, affirm.

24 MR. GOLDSTEIN: That is not the ground on
25 which we have pressed the case in front of you. I'm not

1 trying to make it more complicated. I'm -- it is
2 illustrative of all the rules that they need you to
3 adopt that no court has ever adopted.

4 Remember, on Page 21 of their brief, which
5 is what you're being pointed to as their best cases,
6 they point to three administrative proceedings, no court
7 decision of a district court, court of appeals, or this
8 Court, and it's only on the failure to purchase point.

9 They have no cases in which the -- the core
10 features of this case are present, and that is you have
11 a fraud that would not have an effect they had
12 previously said on the regulated market whatsoever. And
13 it's merely the fact that it's for the benefit of
14 someone else.

15 There -- no court has ever adopted it.
16 And -- and in picking up what this Court said was so
17 important in Zandford and O'Hagan is that it has not
18 been the SEC's position in the past. I know they have
19 said it when they stood up today, but there, the SEC
20 assured you, for decades, we have taken this position,
21 it's been essential to our enforcement priorities, under
22 Section 10b, this case is completely different.

23 JUSTICE ALITO: Well, if we decided the case
24 on that basis, it really would be a one-off. So the
25 SEC, today, has told us this would have an effect on the

1 securities market.

2 But you -- we would hold -- we won't listen
3 to that because, at an earlier point in the case, as
4 interpreted by you, they said it wouldn't. So that
5 would be -- that would be the holding where -- you know,
6 because the SEC previously said it wouldn't be an effect
7 on the securities market, that's the reason for the
8 decision.

9 MR. GOLDSTEIN: No, sir. My point is not
10 that when the SEC says it that it becomes true. We
11 certainly don't agree with that. My point is that they
12 haven't articulated -- before, they said the opposite,
13 and today, they haven't articulated anything that is
14 more than the kind of metaphysical go from here to here
15 to here.

16 And it asks too much when we start from a
17 statute that carved these CDs out. Congress said, we
18 have this idea of a security, we have this idea from the
19 National Securities Markets Improvements Act that the
20 States regulate noncovered securities, and so we are
21 going to say that the preclusive effect of SLUSA does
22 not reach these things like the CDs that we leave to
23 regulation by the State.

24 So this case clearly falls very easily
25 within the -- the text of SLUSA as being not precluded.

1 Then you ask, well, am I going to stretch the language
2 of the statute to say, well, even though these are
3 noncovered CDs, because securities were involved, I
4 think SLUSA should still apply.

5 In asking whether you should stretch the
6 language, you would say, well, what's the point of the
7 phrase "in connection with"? Why did Congress give it
8 that kind of capacious reading, but didn't say fraud
9 about securities or fraud involving securities?

10 It did say "in connection with." And what
11 your precedents have said over and over and over and
12 what has been the dividing line that has prevented 10b-5
13 from swallowing all fraud is these are
14 misrepresentations that affect the regulated market
15 negatively. These -- this fraud did not do that.

16 If there are no further questions.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Clement, you have four minutes.

19 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

20 ON BEHALF OF THE PETITIONERS

21 MR. CLEMENT: Thank you, Your Honor.

22 A couple of are points. First of all,
23 this -- it is just simply wrong that courts have not
24 decided that a purported sale is covered. The Grippo
25 case from the Eleventh Circuit, which we cite in both

1 our opening and reply brief, is one of those cases.
2 There are others consistent with the SEC's longstanding
3 position.

4 JUSTICE SOTOMAYOR: Zandford is a case like
5 that. That --

6 MR. CLEMENT: Zandford is a case from this
7 Court that, essentially, says that as well.

8 JUSTICE SOTOMAYOR: Would you -- among all
9 the circuit courts, which test would you adopt?

10 MR. CLEMENT: I don't know that I would
11 adopt any of them, Your Honor, because I think a lot of
12 them make the same mistake, which is they get
13 materiality, and they sneak it into the "in connection
14 with" requirements. So --

15 JUSTICE SOTOMAYOR: Except Judge Sutton in
16 the Sixth Circuit.

17 MR. CLEMENT: Yes, and I think, if you were
18 going to accept one test, I would accept -- I would ask
19 you to have the Siegel test from Judge Sutton, but I do
20 think it's a mistake to have materiality or causation
21 slip into the "in connection with" requirement.

22 I'd like to start with Justice Kennedy's
23 very apt observation that this fraud here is very
24 similar to the paradigmatic securities fraud where I
25 simply -- a broker simply says, give me your money, I

1 will buy securities, and never does.

2 And from the perspective of the defrauded
3 party, it doesn't matter whether what they get in return
4 is a statement that says they own some securities or a
5 statement in a feeder fund that says they have an
6 interest in the Madoff fund or whether they get, here, a
7 CD that they are told by the -- the brochure that tells
8 them what this is all about, that it's backed by the
9 investments in the securities. They're all one and the
10 same.

11 Another thing I have to correct is it's
12 simply not true that the returns here were not variable
13 on the performance of the portfolio. It's not really
14 well developed in the record here, but if you want to,
15 we could lodge the brochures that are used to market
16 these things that tell these guys that their returns are
17 variable and that they could lose all their principal
18 because of the investments in covered securities.

19 A second thing is, of course, Mr. Goldstein
20 correctly says there are particular problems when broker
21 dealers lie about covered securities. Well, so, too,
22 there are particular problems when an unregistered
23 investment company lies about covered securities. And
24 that's what their own complaint says was the reality of
25 these -- of the Stanford Investment Bank, that it was an

1 unregistered investment company.

2 That's interesting for two reasons. One, if
3 it were a registered investment company, all of its
4 securities would be covered securities. That's another
5 way you can get within the covered security band. So
6 this idea that Mr. Goldstein proclaims, this is not a
7 covered securities fraud, is simply wrong. It is.

8 It was material to this fraud to make
9 misrepresentations about purchases of covered
10 securities. Without those representations that we're
11 going to take their money and we're going to reinvest
12 it -- again, words from their complaint -- in covered
13 securities, nobody's going to give their money to a bank
14 in Antigua.

15 The reason you give your money to a bank in
16 Antigua is because you think it's backed by something
17 more than a piece of paper, and the something more was
18 purchases of covered securities on the market. So --

19 JUSTICE GINSBURG: Even if you're right
20 about that, Mr. Clement, they also said there was a
21 representation that this is insured by Lloyds, and there
22 was another claim that they made. So even -- even if
23 you are right, wouldn't the answer be, okay, drop
24 anything that has to do with "in connection with the
25 sale or purchase of securities."

1 We have -- oh, we have a claim about the
2 insurance, and we also have a claim that both Antigua
3 and United States were heavily regulated. Those were
4 false.

5 Why couldn't they have a complaint shorn of
6 the incorrect premise and based on the insurance and the
7 regulated aspects?

8 MR. CLEMENT: If I can answer? First of
9 all, I think that Mr. Goldstein was quite prudent to not
10 defend the Fifth Circuit's rationale. So the fact that
11 there are other misrepresentations should not mean that
12 a misrepresentation in connection with the purchase or
13 sale of covered securities is somehow okay. SLUSA makes
14 clear that any misrepresentation is enough.

15 Now, the other thing I would say, very
16 briefly, is that they may have an opportunity to try to
17 replead. That, in a sense, is the next case. I assure
18 you that we would be arguing here, where the essence of
19 their claim is to hold the Petitioners secondarily
20 liable for the underlying misrepresentations, they have
21 to sort of have to take them all, but that's the next
22 case.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 12:01 p.m., the case in the
2 above-entitled matter was submitted.)

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