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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE FINANCIAL SERVICES INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of securities firms, banks, and asset managers across the globe. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. Because many of SIFMA's members underwrite or otherwise participate in securities offerings, they have a vital interest in the issues raised by this petition. SIFMA regularly files amicus briefs in cases with broad implications for financial markets, and frequently has appeared as amicus curiae in this Court.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioners and respondents granted consent for the filing of this brief, and the parties were timely notified of amici's intent to file.

Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. Many of the Chamber's members sell stock to the public through offerings governed by federal law and will be directly affected by the issue in this case.

The Financial Services Institute (FSI) was founded in 2004 to ensure that all individuals have access to competent financial advice, products, and services delivered by a growing network of independent financial advisors and independent financial services firms. FSI represents 85 independent financial services firm members and their approximately 140,000 affiliated financial advisors—which comprise more than half of all producing registered representatives in the United States. Collectively, FSI members support 408,000 jobs nationwide and contribute $7.2 billion in federal, state, and local taxes. Through advocacy, education, and public awareness, FSI has successfully promoted a healthier regulatory environment for its members and their customers. As part of its advocacy, FSI periodically participates in litigation as amicus curiae when its members are directly affected, as they are here as significant participants in the U.S. financial markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Private Securities Litigation Reform Act (PSLRA or Reform Act), Congress took assertive action against abusive securities litigation tactics. When class action lawyers circumvented those safeguards by bringing claims under state law, Congress acted again. It passed the Securities Litigation Uniform Standards Act (SLUSA) to bar most state law class actions that allege deceptive conduct "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). Consistent with that plain language and Congress's manifest intent to prevent end-runs around federal protections, this Court has interpreted the phrase "in connection with" broadly, holding that "it is enough that the fraud alleged 'coincide' with a securities transaction." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006).

Despite Congress's clear intent and this Court's decision in *Dabit*, confusion has persisted among the lower courts on the meaning of "in connection with." In *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), this Court clarified that SLUSA's prohibition on state law class actions extended only to cases involving securities covered by federal law. While doing so, the Court expressly disclaimed any suggestion that it was altering the broad reading of "in connection with" laid out in *Dabit*, *id*. at 387-88. But a handful of lower courts, including the Ninth Circuit here, have nonetheless misread *Troice* to impose a "materiality" requirement—even in cases,

like this one, that indisputably involve *covered* securities. As Petitioners ably demonstrate, the Ninth Circuit's decision is irreconcilable with the statutory text and this Court's precedents, and it deepens an entrenched circuit split over the proper interpretation of SLUSA.

Amici wish to emphasize the vital importance of this issue and its far-reaching consequences. The proper functioning of securities markets is essential to the nation's economic wellbeing. Securities issuers and underwriters provide not only hundreds of thousands of American jobs, but also the capital that fuels U.S. companies and sparks innovation. Yet the scourge of meritless securities class actions threatens to stifle that critical engine of growth. The Ninth Circuit's decision exacerbates this problem by allowing more class action plaintiffs to circumvent carefully crafted federal protections through state-law channels. And its erroneous reading of the phrase "in connection with" threatens to unsettle securities law more broadly, given Congress's use of that phrase in other provisions.

This Court's review is needed to restore uniformity to securities law and prevent the Ninth Circuit's decision from undermining Congress's carefully crafted securities-litigation reforms.

ARGUMENT

THE NINTH CIRCUIT'S DECISION UNDERMINES VITAL GOALS OF FEDERAL SECURITIES LAW

A. The Securities Industry Is A Bedrock Of The U.S. Economy

As this Court recognized in *Dabit*, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." 547 U.S. at 78. The securities industry makes possible the capital investments that drive the entire economy.

The U.S. securities industry is a major engine of economic growth, employing nearly one million people. SIFMA, *2021 Capital Markets Fact Book* 9 (2021).[2] Last year, employment in the financial activities sector (which also includes insurance and real estate) accounted for 5.7% of major industry employment in the United States. U.S. Bureau of Labor Statistics, *Employment by major industry sector* (2021).[3] Over the last decade, it has added jobs faster than most other major industries, with employment growth projected to continue in the coming years. *Ibid*. As a percentage of GDP, the finance industry (along with insurance) contributes more to U.S. growth than the construction, manufacturing, entertainment, mining, utilities, agriculture, transportation, or retail

[2] https://www.sifma.org/wp-content/uploads/2021/07/CM-Fact-Book-2021-SIFMA.pdf.

[3] https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm.

industries. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *GDP by Industry, Second Quarter 2021* 4 (2021).[4] Small businesses, too, thrive in this sector. Independent financial advisors, who are often self-employed, support hundreds of thousands of jobs nationwide and contribute tens of billions of dollars to GDP. Financial Services Institute, *The Economic Impact of FSI Members* 4 (2020).[5]

The securities industry is not just an economic powerhouse in its own right. It is also a force-multiplier for the rest of the economy, providing the financing countless companies need to thrive. In 2019, the securities industry raised $2.1 trillion of capital for U.S. businesses through debt and equity issuance. SIFMA, *2020 Capital Markets Fact Book* 8 (2020).[6] Just last year, corporate bond issuance increased to $2.3 trillion, with equity issuance, including common and preferred shares, totaling $390 billion. SIFMA, *2021 Capital Markets Fact Book*, at 8. In this way, the securities industry facilitates the free flow of capital to the most promising enterprises, bolstering innovation, job creation, economic development, and prosperity throughout the country. Its successes have made U.S. capital markets the

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[4] https://www.bea.gov/sites/default/files/2021-09/gdp2q21_3rd.pdf.

[5] https://media.financialservices.org/wp-content/uploads/2021/03/The-Economic-Impact-of-FSI-Members-2021.pdf.

[6] https://www.sifma.org/wp-content/uploads/2021/06/US-Fact-Book-2020-SIFMA.pdf.

largest, most liquid, and most efficient in the world. *Id*. at 7.

B. Class Action Securities Litigation Threatens U.S. Securities Markets

Securities class action litigation poses a threat to this critical sector of the economy, making it all the more important that courts properly apply federal protections against abusive litigation. Congress has recognized that securities litigation "'presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Dabit*, 547 U.S. at 80 (citation omitted). "Even weak cases" can carry "substantial settlement value because the very pendency of the lawsuit may frustrate or delay normal business activity." *Ibid.* (quotation marks, citation, and brackets omitted).

Class actions continue to impose significant drag on the securities industry and the broader economy. While securities class action filings dipped slightly in 2020, the overall rate of activity was still 49% higher that year than the average rate from 1997 to 2019. Cornerstone Research, *Securities Class Action Filings 2020 Year in Review* 1 (2021).[7]

The scope of these suits, not just their total number, is also on the rise. There were thirty $10 billion "mega filings" in 2020, twice the historical

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[7] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review.

average. *Ibid.*[8] And cases filed in recent years "threaten much higher litigation and settlement costs than cases filed in prior years—nearly three times larger than the average for 1997 to 2017." U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* 2 (2019).[9]

This ongoing wave of securities class actions has had a pervasive, deleterious effect on American businesses. Under threat from increased securities litigation, companies have been forced to hold more cash in reserve while reducing capital expenditures. Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. FIN. & QUANTITATIVE ANALYSIS 251, 272-73 (2015). Liability insurance premiums for corporate officers have skyrocketed. *See* Carl E. Metzger & Brian H. Mukherjee, *Challenging Times: The Hardening D&O Insurance Market*, Harvard Law School Forum on Corporate Governance (Jan. 29, 2020).[10] And some companies are eschewing going public altogether. *See* Michael Wusterhorn & Gregory

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[8] "Mega filings" have a maximum dollar loss (MDL) of $10 billion. "MDL is the dollar value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period." Cornerstone Research, *supra*, at 36.

[9] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Securities-Class-Action-Reform-Proposals.pdf.

[10] https://corpgov.law.harvard.edu/2020/01/29/challenging-times-the-hardening-do-insurance-market/.

Zuckerman, *Fewer Listed Companies: Is that Good or Bad for Stock Markets?* WALL STREET JOURNAL (Jan. 4, 2018).[11] These troubling trends underscore the importance of properly interpreting and enforcing protections Congress put in place to curb abusive securities litigation.

C. Congress Intended SLUSA To Prevent Plaintiffs From Circumventing Federal Curbs On Abusive Securities Litigation

To rationalize securities class action litigation, Congress has legislated comprehensively, including by enacting the SLUSA provision at issue here. But to understand SLUSA and this particular provision, it is necessary to begin with its immediate predecessor. In 1995, Congress enacted the Reform Act to crack down on "abuses of the class-action vehicle in litigation involving nationally traded securities" that were "being used to injure 'the entire U.S. economy.'" *Dabit*, 547 U.S. at 81 (quoting H.R. Rep. No. 104-369, at 31 (1995)). The law established both substantive and procedural safeguards for most securities fraud class actions, including limits on recoverable damages and attorneys' fees, a "safe harbor" for forward-looking statements, restrictions on the selection and compensation of lead plaintiffs, mandated sanctions for frivolous filings, an automatic discovery stay, and heightened pleading requirements for alleging fraud. 15 U.S.C. §§ 78u-4, 78u-5.

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[11] https://www.wsj.com/articles/fewer-listed-companies-is-that-good-or-bad-for-stock-markets-1515100040.

But there was an unfortunate gap in Congress's scheme: many class action plaintiffs were able to evade the new requirements by rewriting their complaints to bring their claims under state law. "After the PSLRA was passed," plaintiffs "flocked to the state courts in an attempt to avoid the new law's reforms, filing claims under state law challenging disclosures dictated by the federal securities laws for nationally traded securities." Laurie Smilan & Nicki Locker, *Saying So Long to State Court Securities Litigation*, Harvard Forum on Corporate Governance (Feb. 11, 2019).[12] In response to that "novel" and "unwelcome" development, Congress in 1998 enacted SLUSA "[t]o prevent plaintiffs from circumventing the Reform Act." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1067 (2018).

Like the Reform Act, SLUSA was designed to "put an end to vexatious litigation that was draining value from the shareholders and employees of public companies." H.R. Rep. No. 105-640, at 9 (1998). It was particularly targeted at stopping litigation practices with "the potential not only to undermine the intent of the [Reform] Act, but to increase the overall cost of litigation" through the "filing of parallel claims" under state law. *Id*. at 10 (citation omitted).

The cornerstone of that effort was 15 U.S.C. § 78bb(f)(1), which provides that "[n]o covered class action based" on state law "may be maintained in any

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[12] https://corpgov.law.harvard.edu/2019/02/11/saying-so-long-to-state-court-securities-litigation/.

State or Federal court" by any "party alleging—(A) a misrepresentation or omission of a material fact *in connection with* the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance *in connection with* the purchase or sale of a covered security." *Ibid*. (emphases added). For SLUSA's purposes, a "covered" class action means a suit or group of suits seeking damages on behalf of "more than 50 persons or prospective class members" or "unnamed parties." 15 U.S.C. § 78bb(f)(5)(B). And a "covered" security means those securities "qualified for trading in the national market," "listed * * * on a national securities exchange," or "issued by an investment company that is registered * * * under the Investment Company Act of 1940." 15 U.S.C. § 78bb(f)(5)(E); 15 U.S.C. § 77r(b). In other words, Congress sought to ensure that federal law, not state law, would provide the exclusive rule of decision for the vast majority of securities class actions, thus reducing opportunities for abuse as the 1995 Reform Act had originally intended.

Consistent with those goals, this Court has interpreted SLUSA's key provision broadly. Noting that "a broad construction follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment," the Court in *Dabit* read § 78bb(f)(1)'s key phrase—"'in connection with the purchase or sale of'" securities—as extending to any cases in which "the fraud alleged 'coincide[s]' with a securities transaction." 547 U.S. at 85-86. The Court emphasized that

was the same broad standard that applies to the exact same phrase in the context of Section 10(b) and Rule 10b-5. *Id.* at 86. As the Court explained, "[a] narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose"—" 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act." *Ibid.* (quoting SLUSA, Pub. L. No. 105-353, § 2(5), 112 Stat. 3227, 3327 (1998)).

D. The Decision Below Undermines Congress's Objectives, Disrupts Securities Law, And Sows Confusion

The Ninth Circuit's interpretation of SLUSA here is not just wrong. It directly undermines Congress's central goal in enacting that statute: preventing plaintiffs from evading federal limitations on securities class actions. The decision also aggravates a circuit split on a critical statutory phrase, sowing confusion and promoting forum-shopping.

1. The Ninth Circuit's narrow interpretation of "in connection with" is wrong

Petitioners thoroughly show how the decision below conflicts with this Court's decisions and the plain statutory text. *See* Pet. 21-29. But it is worth briefly highlighting the Ninth Circuit's error. According to the court of appeals, the phrase "in connection with" in § 78bb(f)(1) "requires a showing of materiality," permitting state claims relating to

covered securities to proceed unless the alleged deception directly motivated a change in trading behavior. Pet. App. 16a-20a.

Nothing about the phrase "in connection with" suggests Congress intended to require such direct causation between an alleged deception and a securities transaction. Absent a specific statutory definition, this Court interprets statutory "words consistent with their 'ordinary meaning * * * at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (citation omitted) (alteration in original). By its plain terms, the word "connection" denotes a far broader range of relationships than the Ninth Circuit's reading would permit. *See Connection*, *Merriam Webster's Collegiate Dictionary* 245 (1999) (defining "connection" as a "contextual relation or association," a "relationship in fact," or a "causal or logical relation or sequence").[13] Just as this Court has recognized in the class certification context, courts should not "adopt[] an atextual requirement of * * * materiality that Congress, despite its extensive involvement in the securities field, has not sanctioned." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013).

The phrase "in connection with" is a common one in federal statutes, and in a variety of contexts this Court has rejected efforts to impose atextual limitations on it. *See*, *e.g.*, *Mont v. United States*, 139 S. Ct.

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[13] https://archive.org/details/merriamwebstersc00merr_3/page/245/mode/2up.

1826, 1832 (2019) (broadly construing the phrase "imprisonment in connection with a conviction") (brackets omitted); *United States v. Am. Union Transp.*, 327 U.S. 437, 441-43 (1946) (rejecting effort to limit "broad and general" "in connection with" language of the Shipping Act); *Danciger v. Cooley*, 248 U.S. 319, 326-27 (1919) (rejecting narrow interpretation of "in connection with" in statute regulating alcohol shipments that would have allowed Congress's purpose to be "evaded").

And in the particular context of securities actions brought under Rule 10b-5, this Court has held that deceptive conduct is "'in connection with'" a securities transaction whenever the two are "not independent events." *S.E.C. v. Zandford*, 535 U.S. 813, 819-20 (2002). *See also United States v. O'Hagan*, 521 U.S. 642, 655-56 (1997) (holding that misappropriation of confidential information was "in connection with" a securities transaction "even though the person or entity defrauded is not the other party to the trade").

In sum, the Ninth Circuit's interpretation cannot be reconciled with the provision's plain language or this Court's precedent.

2. The Ninth Circuit's decision runs contrary to SLUSA's animating purpose

The Ninth Circuit's misreading of SLUSA is no minor textual error. It undermines Congress's central purpose in enacting the statute: to maintain a federal rule of decision in most securities class actions by

closing the state-law loophole left open by the Reform Act.

As Congress explained in enacting SLUSA, "[t]he solution to" the problem of plaintiffs circumventing the Reform Act is to "preempt[ ] securities fraud class actions brought under State law." H.R. Rep. No. 105-640, at 10-11. Thus, as this Court has warned, a "narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act." *Dabit*, 547 U.S. at 86.

The Ninth Circuit's narrow reading of SLUSA permits the plaintiffs here to engage in exactly the kind of circumvention the statute was meant to bar. The same alleged omissions and misrepresentations about the suitability of advisory accounts formed the gravamen of both plaintiffs' federal and their state claims. As the district court explained, "[p]laintiffs fail[ed] to demonstrate [that] the deceptive conduct alleged in their [federal] securities claims, is not also at the heart of their state claims." Pet. App. 35a. The federal claims failed because the allegations were insufficient to satisfy the Reform Act's heightened pleading standards. Pet. App. 43a-48a. Yet the Ninth Circuit permitted the same substantive claims to proceed under state law—the very result Congress enacted SLUSA to prevent. *See Dabit*, 547 U.S. at 86 (warning against interpretation of SLUSA that would "give rise to wasteful, duplicative litigation").

Even more troubling, the Ninth Circuit's decision provides a roadmap for other enterprising class plaintiffs who hope to avoid the Reform Act's restrictions. As long as a state claim is artfully pleaded to allege something less than direct causation between a misrepresentation and a securities transaction, plaintiffs in the Ninth Circuit may be able to proceed with state class actions premised on the same factual grounds as a federal securities claim. The Ninth Circuit's "narrow reading of the statute" thus "undercut[s] the effectiveness of the 1995 Reform Act" and "run[s] contrary to SLUSA's stated purpose." *Ibid.*

3. The Ninth Circuit's decision undermines uniform application of securities law and creates substantial uncertainty

Stability and uniformity of law benefits litigants of all stripes. As this Court has observed, "[p]redictability" is particularly "valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The Ninth Circuit undermined those objectives when it read a "materiality" requirement into § 78bb(f)(1)'s state law class action prohibition. If left standing, that decision will have disruptive effects on securities law.

To start, the decision entrenches a circuit split that makes uniform application of securities law across the country impossible. As Petitioners explain, the First, Third, and Ninth Circuits now allow state law claims that would be barred in the Seventh and

Eighth Circuits. Pet. 34. Those divergent rules are not what Congress intended. It wanted the Securities Litigation *Uniform* Standards Act to "establish[] uniform national rules for securities class action litigation involving our national capital markets." H.R. Rep. No. 105-640, at 9. *See also* § 2(5), 112 Stat. at 3227 (finding that "it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities").

The Ninth Circuit's decision is particularly disruptive because state and federal courts in California attract an outsized portion of securities-related litigation. As the House Report on SLUSA noted, "[i]n California, State securities class action filings in the first six months of 1996 went up roughly five-fold compared to the first six months of 1995, prior to passage of the Reform Act." H.R. Rep. No. 105-640, at 10. California was, in fact, the only state singled out by the House Report. And it has continued to draw securities litigation of all types in the years since. Over the last decade, for example, California averaged more 1933 Securities Act filings in its state courts than all other states except New York combined. Cornerstone Research, *supra*, at 19. And filing state-law securities class actions in the federal courts of the Ninth Circuit has become an even more attractive prospect for class plaintiffs thanks to the decision below.

Confusion among the lower courts over the meaning of "in connection with" a security may not be limited to SLUSA. The Ninth Circuit's erroneous construction also threatens to disrupt cases requiring

courts to interpret similar language in other statutes. Indeed, the phrase "in connection with" appears in a number of important anti-fraud statutes. *See*, *e.g.*, 7 U.S.C. § 6b (Commodity Exchange Act); 15 U.S.C. § 1679b (Credit Repair Organizations Act). And as discussed above, SLUSA's "in connection with" requirement is interpreted consistent with identical language in Section 10(b) and Rule 10b-5. *See supra* pp. 12-14. That interpretative parity was central to the Court's analysis in *Dabit*. *See* 547 U.S. at 86 ("[N]ot only did Congress use the same words as are used in § 10(b) and Rule 10b-5, but it used them in a provision that appears in the same statute as § 10(b)."). And this parity was consistent with Congress's purpose—conduct falling within Section 10(b)'s ambit should be litigated (at least in the class context) under federal standards.

The general anti-fraud provisions of Section 10(b) and Rule 10b-5 form the basis of both private and public enforcement of federal securities laws, and "a substantial body of case law and commentary has developed" around their proper interpretation. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976). As Justice Kennedy warned in *Troice*, perceived inconsistency between identical phrases in SLUSA and Rule 10-5 "introduces confusion in the enforcement of securities laws." 571 U.S. at 414 (Kennedy, J., dissenting). That confusion is already apparent in the entrenched circuit split over SLUSA, and is sure to spread without this Court's intervention.

In sum, this Court's review is needed to restore uniformity to federal securities law and ensure proper application of reforms meant to protect securities markets from abusive litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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