No. 04-1371

IN THE
Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari and there are no amendments to that statement.

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The Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, expressly preempts certain state law class actions based on the substance of the allegations in the complaint: "*No* covered class action" under state law may be maintained "by *any* private party alleging" deception or misrepresentation "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added). Disregarding the statutory text, the court of appeals concluded that SLUSA preemption does not extend to state law class actions by "any private party" alleging the specified misconduct, but rather only precludes actions based on the identity of the private class action plaintiffs as purchasers or sellers of securities. That holding, and the arguments of Respondent and *amici* in support thereof, ignore the plain language and natural meaning of the express preemption provision; misconstrue the *Blue Chip Stamps* policy-based standing requirement as a construction of the "in connection with the purchase or sale" statutory language; seek to avoid the dispositive effect of prior decisions of the Court by adopting a novel and unsupported claim that the same statutory language has a different and more restrictive meaning in the private civil than in the criminal context; and misapprehend the purpose of SLUSA.

I. SLUSA Preemption Is Triggered By The Nature Of The Misconduct Alleged, Not By The Identity Of Plaintiffs

Had Congress intended by SLUSA to limit preempted class actions to those brought by purchasers or sellers of securities, it could easily have stated that

> "No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party *who purchased or sold a covered security* alleging an untrue statement or omission of a material fact or the use or employ of any manipulative or deceptive device or contrivance by defendant."

See, e.g., Pet. Br. at 23 (listing provisions in the securities laws where Congress expressly limited statutory coverage only to purchasers or sellers of securities). Instead, Congress used a more inclusive formulation that turns on the substance of the

allegations against defendant rather than the identity of the class action plaintiffs as triggering preemption: Congress preempted all covered class actions by "any private party" alleging certain acts, which were set off in two separate subparagraphs, and each of which described conduct or misstatements using the phrase "in connection with the purchase or sale" of a covered security. *See* Br. App. at 8a; *see generally United States v. Gonzales*, 520 U.S. 1, 5 (1997) (construing "any" to mean "all"; "the word 'any' has an expansive meaning"); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 278-79 (1992) (O'Connor, J., concurring, joined by White and Stevens, JJ.) (interpreting use of "any person" in RICO to encompass "all" and rejecting contention that the language could "reasonably be read to mean only purchasers and sellers of securities"); *Mobil Oil Exploration v. United Distribution*, 498 U.S. 211, 223 (1991) (interpreting statute concerning regulation of prices for "any natural gas" category as applying to all natural gas categories, "[i]nsofar as 'any' encompasses 'all'").

Respondent concedes that the conduct alleged in his complaint relates to "trading practices involving manipulation of the securities markets." Resp. Br. at 8. Respondent does not dispute that his holder claim necessarily involves allegations that defendant's conduct affected the market value of securities or the price at which securities are purchased or sold. Pet. Br. at 21-23, 27-28 (quoting *Basic Inc. v. Levinson* and *SEC v. Texas Gulf Sulphur*). Thus, apart from the question whether the purchaser-seller standing requirement is imported into SLUSA, Respondent does not dispute that his claims otherwise involve allegations of misstatements "in connection with the purchase or sale" of securities. Pet. Br. at 24-27 (citing *SEC v. Zandford*, 535 U.S. 813 (2002)).

Respondent also concedes (at 22) that the "in connection with" language in SLUSA's preemption provision must be accorded the same meaning as in section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). But he gives short shrift to that plain statutory language, resting his argument instead on two flawed propositions: first, that the *Blue Chip Stamps* purchaser-seller standing rule, which restricts who may bring implied private

rights of action under section 10(b), is a limiting construction of the "in connection with" statutory language that is also used in SLUSA, and second, that the meaning of "in connection with the purchase or sale" is different and narrower in the private, as opposed to civil regulatory or criminal, context. Respondent accordingly contends that Congress intended in SLUSA to import only the so-called more restrictive meaning of "in connection with" as construed by *Blue Chip Stamps* in the context of private damages claims under section 10(b).

Both propositions have been squarely rejected by this Court's decisions. Whatever additional requirements (standing or otherwise) must be satisfied for a plaintiff to bring a judicially implied private right of action under section 10(b), the plain meaning of the statutory text and the scope of *defendant's* conduct that is prohibited by section 10(b) does not vary whether the plaintiff is a private party, the SEC, or a public prosecutor, and most certainly is not *narrower* in the civil, as opposed to criminal, context.

1. Central to Respondent's textual argument is the misguided premise that the purchaser-seller standing limitation adopted by this Court in *Blue Chip Stamps* rested upon an interpretation of the "in connection with the purchase or sale" language of section 10(b). A simple reading of *Blue Chip Stamps* and subsequent case law belies that central premise. *Blue Chip Stamps*, to be sure, analyzed the text and intent of the provision to confirm that a purchaser-seller standing limitation would not be *inconsistent* with the language and intent of Congress. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-36 (1975).

But the bulk of the Court's decision (*see id.* at 737-49) rested on "what may be described as policy considerations . . . to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Id.* at 737; *see also id.* ("[W]e would by no means be understood as suggesting that we are able to divine from the language of § 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b-5."); *id.* at 739 (considering advantages of purchaser-

seller rule "purely as a matter of policy"); *id.* at 744 ("considering the policy underlying the *Birnbaum* rule"); *id.* at 749 (resting in large part on "considerations of policy" "[t]aken together with the precedential support for the *Birnbaum* rule over a period of more than 20 years"); *id.* at 754-55 (same).

A statutory provision intended principally as a criminal and SEC catch-all antifraud provision – for which the purchaser-seller standing limitation undisputedly does not apply – could not properly have been construed as requiring such a standing limitation for private actions when private actions were not even specifically authorized or legislatively created. As the Court explained:

> [W]e are not dealing here with any private right created by the express language of § 10(b) or of Rule 10b-5. *No language in either of those provisions speaks at all to the contours of a private cause of action for their violation*. . . . We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. . . . *[W]e believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.*

Id. at 748-49 (emphasis added); *see also id.* at 751 n.14 ("[T]he purchaser-seller rule imposes no limitation on the standing of the SEC to bring actions for injunctive relief under § 10(b) and Rule 10b-5."); *cf. Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694 n.7 (1985) ("In this case, *unlike with respect to the interpretation of § 10(b) in Blue Chip Stamps*, we have the plain language of § 2(1) of the 1933 Act in support of our interpretation.") (emphasis added); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 43 n.31 (1977) (*Blue Chip Stamps* "limited standing under Rule 10b-5 to purchasers or sellers of securities").

One year before SLUSA was enacted, the Court confirmed that *Blue Chip Stamps* was based on "'policy considerations,'" not the language of section 10(b). *United States v. O'Hagan*,

521 U.S. 642, 664-65 (1997) (quoting *Blue Chip Stamps*, 421 U.S. at 737). The Court thus concluded that section 10(b), "as written, does not confine its coverage to deception of a purchaser or seller of securities," *O'Hagan*, 521 U.S. at 651, but instead may be violated "even though the person or entity defrauded is not the other party to the trade," *id.* at 656; *see also* Pet. Br. at 32-33; *Holmes*, 503 U.S. at 285 (O'Connor, J., concurring, joined by White and Stevens, JJ.) ("The purchaser/seller standing limitation . . . does not stem from a construction of the phrase 'in connection with the purchaser or sale of any security.'"); *id.* at 289-90 (Scalia, J., concurring) ("[T]he limitation we approved in *Blue Chip Stamps* was essentially a legislative judgment rather than an interpretative one."); 8 Louis Loss & Joel Seligman, *Securities Regulation* 3721 (3d ed. 2004) ("in connection with" element met if "*someone* buy[s] or sell[s] the security during the period of allegedly fraudulent conduct").

2. Respondent and his *amici* dismiss these clear statements by this Court with a sleight-of-hand: they assert that *O'Hagan* merely confirmed that the *Blue Chip Stamps* purchaser-seller rule "was specific to the implied private right of action under § 10(b) and did not determine the scope of § 10(b) liability in regulatory or criminal enforcement suits." Resp. Br. at 25. Respondent argues, in effect, that the language of § 10(b) has been interpreted to mean one thing in the civil regulatory or criminal context, and to have another, narrower meaning in the private right of action context.

But this contention falls back on the erroneous proposition that *Blue Chip Stamps* purported to rest on a construction of the plain language of section 10(b) and Rule 10b-5, whether in the private civil action context or any other. More fundamentally, the same language of the statute does not mean one thing in one context and a different thing in another context. SLUSA's use of the "in connection with" language thus does not import a more restricted meaning of section 10(b) allegedly applicable in the private right of action context, as distinct from the more expansive meaning set forth in the criminal or regulatory context.

It is a well-established principle of this Court that the same statutory language has the same meaning, notwithstanding the fact that it has multiple applications. *See, e.g.*, *Leocal v. Ashcroft*, 125 S. Ct. 377, 384 n.8 (2004) ("Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. . . . [W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . . ."); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the [FCC] and another for the [DOJ]. If we should give [the statutory provision] the broad construction urged by the [FCC], the same construction would likewise apply in criminal cases.").[1]

In fact, this Court has consistently construed the 1933 and 1934 Acts across varying civil and criminal contexts. In *Aaron v. SEC*, 446 U.S. 680 (1980), the Court construed section 10(b) of the 1934 Act to include a *scienter* requirement in SEC enforcement proceedings, based on "controlling precedent" that involved a private cause of action for damages. *See id.* at 689-91. In so doing, this Court specifically rejected the argument, embraced by the dissent, that the Court's prior interpretation of section 10(b) in the private damages action was "not a proper guide in construing § 10(b) in the present context of a[n SEC] enforcement action for injunctive relief." *Id.* at 691-95. Instead, the Court concluded: "In our view, the rationale of [the controlling precedent] ineluctably leads to the conclusion that scienter is an element of a violation of § 10(b) and Rule 10b-5,

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1. *See also Clark v. Suarez Martinez*, 125 S. Ct. 716, 722-27 (2005) (refusing to give the same statutory provision different meanings that depended on its application to different categories of people defined by the statute, noting "the dangerous principle that judges can give the same statutory text different meanings in different cases"); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation, here § 5322(a), the same way each time it is called into play.") (citation omitted; emphasis in original); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943) ("[W]e cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked [in a civil *qui tam* suit].").

regardless of the identity of the plaintiff or the nature of the relief sought." *Id.* at 691.[2]

There accordingly is no basis for ascribing to the "in connection with" language contained in section 10(b) and SLUSA's preemption provision a different or narrower meaning in the private action context. To the contrary, preemption under SLUSA is triggered by *allegations* concerning the conduct, regardless of the identities of the private class action claimants, just as the scope of liability under section 10(b) is triggered by the scope of the unlawful conduct rather than the identity of the plaintiff. *See* Pet. Br. at 31 (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172-73 (1994); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 64 (1975)).

II. The Asserted Presumption Against Preemption Is Unavailing In This Case

Respondent's and *amici*'s attempt to invoke the "presumption against preemption" is to no effect. Even if such a "presumption" does have weight under this Court's jurisprudence, *see, e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (decision of the Court by seven Justices noting that "not all Members of [the] Court agree" on the applicability of a "presumption" in preemption cases, and declining to apply it in that case), it is at most a "canon[] of interpretation" that is not applicable, as here, to "a nonambiguous command to pre-empt." *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005). Moreover, contrary to Respondent's and his *amici*'s repeated misstatement of the question presented, SLUSA preempts only certain

2. If anything, principles of lenity would dictate a narrower reading of statutory coverage in the criminal context. *See* Pet Br. at 27; SIA Br. at 10-11 & n.6. For this reason, Respondent and *amici*'s distinction of *O'Hagan* simply because it is a criminal case is unavailing. Indeed, lower courts routinely rely upon criminal and SEC enforcement cases in construing the language of section 10(b) in the private civil context. *See, e.g., Foss v. Bear, Stearns & Co.*, 394 F.3d 540, 541-42 (7th Cir. 2005) (citing *Zandford*, *O'Hagan*, and *Naftalin*); *Grippo v. Perazzo*, 357 F.3d 1218, 1223-24 (11th Cir. 2004) (citing *Zandford*); *Smith v. Am. Nat'l Bank & Trust Co.*, 982 F.2d 936, 942-43 (6th Cir. 1992) (citing *Chiarella* regarding duty to speak); *Polinsky v. MCA Inc.*, 680 F.2d 1286, 1289 (9th Cir. 1982) (citing *Chiarella* regarding duty to speak).

covered *private class actions* under state law involving nationally traded securities, and does not preempt any state law *claims* altogether. The area at issue here – private state law holder class actions involving nationally traded securities – is hardly a longstanding and venerable category of state regulatory activity for which a presumption against preemption is warranted.

1. Where, as here, Congress' intent to preempt is expressly manifested in a statutory provision, Respondent concedes that the Court's task is simply to construe that statute according to its plain language and natural meaning. *See* Resp. Br. at 21 (citing *CSX Transp., Inc. v. Easterwood*); *see also Engine Mfrs.*, 541 U.S. at 256-57 (declining to invoke presumption against preemption where "the language of [an express preemption provision] is categorical"); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) ("Contrary to the dissent's suggestion that the resolution of this case depends on one's view of federalism, . . . we are called upon merely to interpret ERISA."); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-70 (2002) (while finding no preemption, the unanimous Court applied express and implied preemption analyses in an area traditionally regulated by the states, recreational boat safety, with no mention of the presumption against preemption).[3]

Indeed, preemption "'is *compelled* whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *FMC Corp. v Holliday*, 498 U.S. 52, 56-57 (1990) (emphasis added) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)).

The principal cases in which members of this Court have invoked the so-called "presumption" against preemption underscore the extent to which it is unavailing in this case. In

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3. *See also Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 (1992) (making no mention of presumption against preemption and refusing to read express preemption provision narrowly: "our task is simply to ascertain the fair meaning of that term"); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-86 (2000) (applying express and implied preemption analyses without invoking presumption against preemption, despite strong dissent articulating the presumption).

Bates, the Court mentioned the "duty to accept the reading that disfavors pre-emption" only *after* it had concluded as a matter of statutory construction that most of the asserted state common law damages claims *were* preempted. The Court did not base its holding of no preemption as to the remaining few state law claims upon the so-called "presumption," but instead rested on the plain language of the statutory preemption provision. It held that a contrary holding would read certain words out of the statute and would not present "a plausible alternative reading of" the provision. 125 S. Ct. at 1801; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996) (interpretation of preemption provision must begin with statutory text; congressional purpose remains the touchstone, and the presumption against preemption is overcome by a "fair understanding of congressional purpose").

Indeed, the *Bates* Court mentioned the presumption against preemption only in the context of noting that the United States argued against preemption of the same claims in earlier separate litigation and switched positions in *Bates*. The Court thus rejected "[t]he notion that FIFRA contains a nonambiguous command" to preempt. 125 S. Ct. at 1801. Here, by contrast, the SEC's interpretation of the broad scope of the "in connection with" language as not restricted by the purchaser-seller standing rule accords with its longstanding practice, *see* Pet. Br. at 26 n.7, 28 n.8, and there is no hint in SEC rulings or this Court's decisions of any ambiguity in this longstanding statutory interpretation.

Even in areas traditionally subject to state regulation, where members of this Court have referred to the presumption against preemption, this Court has dispensed with the presumption where Congress had made its intent clear. As the Court explained in *Egelhoff*, with respect to areas of traditional state regulation such as family law and probate law: "[The presumption against preemption] can be overcome where, as here, Congress has made clear its desire for pre-emption. Accordingly, we have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans." 532 U.S. at 151; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42, 547-48 (2001) (identifying advertising as

field of traditional state regulation to which presumption against preemption applied but rejecting "narrow construction" of express preemption provision of "debatable" meaning). In such cases, the "presumption" against preemption is merely a reminder that Congress' intent to preempt should be sufficiently clear in the language, structure and purpose of the statute.

There is no ambiguity here. In SLUSA, Congress enacted a statute for the very purpose of displacing state securities class actions. Preemption was not a supplement to other federal regulatory goals, but instead was the core object of SLUSA. The so-called "presumption against preemption" does not affect the analysis in this case that is driven by the clear text and purpose of SLUSA.

2. Respondent and his *amici* assert that holder class actions preempted by SLUSA have a history of more than 150 years. *See* Resp. Br. at 4-6, 27, 35; States' Br. at 4-7. But of the 12 holders cases they cite that were brought before SLUSA's enactment, none involved a state court class action. One involved a federal court's approval of a class action settlement of purchaser and holder claims. *See Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982). Of the 11 pre-SLUSA *individual* actions, apparently only one involved nationally traded securities. *See David v. Belmont*, 291 Mass. 450, 197 N.E. 83 (1935). Every other holders' case cited by Respondent or the *amici* was brought after SLUSA's enactment.[4]

Far from constituting a long and venerable history of holders' state law class action jurisprudence over 150 years

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4. Respondent also cites several federal court cases which, applying state law, held that holders of securities may not maintain direct damages actions. *See* Resp. Br. at 43 & nn.48-52. Only four of these were brought before SLUSA's enactment, and none of these four was a class action related to nationally traded securities. *See Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370 (8th Cir. 1992); *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690 (7th Cir. 1990); *Crocker v. FDIC*, 826 F.2d 347 (5th Cir. 1987); *Chanoff*, v. *United States Surgical Corp.*, 857 F. Supp. 1011 (D. Conn.), *aff'd mem.*, 31 F.3d 66 (2d Cir. 1994).

that would be displaced by SLUSA, the sporadic and inapposite cases cited by Respondent simply underscore that state law holder class actions are of recent vintage and represent an attempt by the plaintiffs' bar to evade the congressional mandates set forth in the PSLRA. They do not constitute the kind of traditional state activity that merits a "presumption" against preemption.

Respondent and his *amici* further contend that the long existence of state regulatory schemes governing securities, known as Blue Sky laws, counsels against a finding of preemption of holder class actions under SLUSA, and in favor of a presumption against preemption. As one of the *amici* acknowledges, however, Blue Sky laws regulated only *intrastate* concerns. Bulldog Br. at 4-5. Indeed, "[t]he fact that Blue Sky regulation applied only to sales of securities and licensing of persons within the borders of a state mitigated any Commerce Clause concerns." 1 Robert N. Rapp, *Blue Sky Regulation* § 1.02[2] & n.27 (2005) (citing *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557-58 (1917)); *accord Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982). Moreover, it was the inability of states effectively to regulate nationally traded securities that spawned the need for federal regulation in 1933 and 1934. *See* 1 Louis Loss & Joel Seligman, *Securities Regulation* 193-99 (3d ed. 1998).

Significantly, shortly before the passage of SLUSA, Congress found that even this traditional intrastate regulation was unnecessarily burdensome to the national securities markets and so enacted the National Securities Markets Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, 110 Stat. 3416. The passage of NSMIA ensures that States cannot interfere in the regulation of nationally traded securities by imposing requirements on securities offerings and "as a general rule, designat[es] the Federal government as the *exclusive* regulator of national offerings of securities." H.R. Rep. No. 104-622, at 16 (1996) (emphasis added). Section 18(a) of the 1933 Act unequivocally provides that no state

may require registration or qualification of securities or securities transactions with respect to covered securities, nor may the states conduct merits reviews of offerings or impose requirements on the content of proxy solicitation materials required to be filed with the SEC.

Far from undermining a long history of state regulation of nationally traded securities, SLUSA thus marked the third in a series of major congressional enactments between 1995 and 1998, after the PSLRA and NSMIA, designed to alter the relationship between federal securities law and state law. Indeed, the duality of state and federal court securities litigation to which this Court referred in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (cited in Resp. Br. at 4), was based upon a version of section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), that was specifically amended to except the impact of the preemption provisions under SLUSA.[5]

III. Congress Intended To Provide Defendants With The Protections Of The PSLRA And SLUSA Regardless Of The Identity Of The Plaintiffs

The plain language of SLUSA is dispositive of this case. "[W]e do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf*, 510 U.S. at 147-48. *Accord Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2625-27 (2005). This is especially true where Respondent's citation of isolated snippets from the legislative history, excerpted with abundant ellipses, is simply "an exercise in 'looking over a crowd and picking out your friends.'" *Id.* at 2626 (citation omitted).

Moreover, as the court of appeals below found (Pet. App. 31a-33a) and as the Respondent does not dispute, there is an

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5. *See* 15 U.S.C. § 78bb(a), (f). An identical amendment was added to the analogous provision under section 16(a) of the 1933 Act, 15 U.S.C. § 77p(a) ("*Except as provided in subsection (b)*, the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.") (emphasis added).

absence of any congressional discussion in the legislative history of SLUSA concerning the continued viability of state law holder class actions or the applicability of the purchaser-seller standing rule to the scope of preemption. Under these circumstances, congressional silence cannot be the basis for adopting a limiting construction or exception which does not appear on the face of the statute. *See Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute."). Particularly because there is *no* longstanding tradition of state law holder class actions that would be displaced by SLUSA, it is not surprising that Congress was silent about the impact of SLUSA's broad preemptive scope upon such claims. *Compare City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1465 (2005) (Stevens, J., concurring) (judges may "take into consideration the fact that a watchdog did not bark in the night" where a construction would make "so sweeping and so relatively unorthodox a change" in the law) (quotation omitted).

The legislative history of SLUSA confirms that Congress considered covered private state law class actions to be inherently susceptible to abuse. It accordingly concluded, as a policy matter, that they should be preempted and removable to federal court even if no corresponding private federal class action remedies are available. It would be anomalous, indeed absurd, to conclude that when Congress used the "in connection with" language in SLUSA – a statute designed to curtail abusive securities fraud claims and prevent them from being filed under state law – it intended to revive, in class action format, the very holder suits held by this Court in *Blue Chip Stamps* to be particularly susceptible to abuse, and to preempt only suits by purchasers and sellers.

1. There is no support in the legislative history, as Respondent repeatedly contends (at 1, 20, 30-34, 37-38), for the proposition that Congress intended to preempt only state

law class actions asserting federally cognizable claims. To the contrary, the enacted findings of SLUSA state more broadly that "it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities." SLUSA § 2(5), 112 Stat. at 3227. In any event, "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) (quoted in *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005)).

In fact, it was the weaker claims (those that would not be cognizable under the federal securities laws) that were increasingly being brought in state court as class actions and that Congress sought to curtail. As Senator Dodd, one of SLUSA's co-sponsors, explained:

> My fear is that the State court filings represent those suits that aren't strong enough to stand up in Federal court. Securities class actions were almost unheard of in State court prior to 1995; it is reasonable then to attribute the increase in both 1996 and 1997 to weaker, and frequently abusive, claims finding a more comfortable home in State court than in Federal court.

1997 Oversight Hearing, at 3-4 (Opening Statement of Sen. Dodd).[6] Indeed, in words remarkably similar to the policy

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6. Respondent mis-cites Senator Dodd for the proposition that the legislative history "unambiguous[ly]" states that Congress intended "to leave unaffected traditional state-law securities class action suits" Resp. Br. at 32, 37 (citing 143 Cong. Rec. S10477 (daily ed. Oct. 7, 1997) (Statement of Sen. Dodd)), yet Respondent's brief simply uses ellipses (at 32) to substitute "state law securities class action[s]" for the exceptions Senator Dodd actually described: that the bill "does not affect individual actions in State court; it does not protect penny stocks or delisted securities, rollups, or securities sold only within a single State; it does not protect bad brokers or investment advisors; it does not impact on State regulators." 143 Cong. Rec. S10477. Senator Dodd declared in the sentence immediately preceding the snippet

(Cont'd)

arguments posited in Respondent's brief, then-SEC Chairman Levitt testified that:

> The practical effect of passage [of S.1260] will be that State securities laws will be inapplicable in most class actions, whether brought in Federal or State court. The governing law will be Federal law. Because a number of States allow claims that cannot be brought under Federal law and because it is not always cost-effective for plaintiffs to proceed individually, the bill will preclude relief as a practical matter for some small investors who may have been defrauded.
>
> As a result, certain investor protection laws available at the State level, which the Commission favors, would no longer be available.

1997 Hearing on S. 1260, at 47 (Prepared statement of Arthur J. Levitt, Jr., Chairman and Isaac C. Hunt, Jr., Commissioner, SEC); *see also, e.g.*, Pet. Br. at 46-48 & n.16; H.R. Rep. No. 105-640, at 46-51 (1998) (dissenting views highlighting that some aggrieved investors will be left with no class remedies in federal or state court); 144 Cong. Rec. S4795 (statement of Sen. Bryan) (same); *Hearing on H.R. 1689*, at 24 (Prepared statement of Arthur Levitt).

(Cont'd)

quoted by Mr. Dabit that "[t]he principle of national treatment for national securities trading on national exchanges is as solid for legislation on securities litigation as it was for securities regulation," *id*. (referring to the prior enactment of NSMIA), and continued that class actions involving nationally traded securities were only "appropriately heard on the federal level" and that "if our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong, we must create uniformity and certainty." *Id. Compare also, e.g., 1997 Hearing on S. 1260*, at 2 (Opening statement of Sen. Gramm) (explaining that SLUSA basically says that "for class action suits, and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly an overriding national interest, that those suits have to be filed in Federal court.") *with* Resp. Br. at 31.

Thus, Congress recognized that with SLUSA, certain remedies would be foreclosed. Although it added a few exceptions to SLUSA preemption in response to the concerns of Mr. Levitt and others, Congress did not add holder claims to its exceptions or exemptions from SLUSA preemption.

2. A full reading of the Conference Report and other isolated excerpts of legislative history cited by Respondent (Resp. Br. at 31-32 & n.37) reveals that Congress intended to prevent plaintiffs from using state courts to pursue a wide range of abusive securities class actions which, prior to the passage of the PSLRA, were all but non-existent in the state courts. *See* H.R. Conf. Rep. No. 105-803, at 14-15 (1998) (stating Congress' intent to prevent plaintiffs from exploiting "differences between Federal and State laws" by preempting state law securities class actions more broadly). *Compare* Resp. Br. at 31 (citing the Conference Report for the proposition that "Congress determined that the increase [in state court filings] was due to plaintiffs with federally cognizable claims leaving federal court and filing those same claims under state law").

Congress heard testimony that differences between federal and state law are significant and susceptible to abuse. Even if a plaintiff satisfies the *Blue Chip Stamps* standing requirement and PSLRA's procedural requirements, there are numerous other substantive reasons why such a plaintiff may still not be able to assert a federally cognizable securities claim, including (i) the expiration of the shorter federal statute of limitations; (ii) the absence of a federal claim for aiding and abetting liability; (iii) the substantive protection of the PSLRA's safe harbor for forward-looking statements; (iv) the requirement of *scienter* and allegations of fraud rather than mere negligence; and (v) the need to allege and prove loss causation. *See, e.g., 1998 Hearing on S. 1260*, at 18 (testimony of Professor Painter warning Congress that in light of these differences some plaintiffs after SLUSA will be left without a class action remedy, noting that under federal law: "*You cannot sue if you did not yourself personally buy*,

or if you did not yourself personally sell securities, under the Blue Chip Stamps case.") (emphasis added).[7] *Compare Resp. Br.* at 36 (acknowledging differing elements of state law causes of action).

Yet under Respondent's reading, plaintiffs barred from federal court for these substantive reasons would remain free to bring state class actions. For example, if SLUSA would not preempt state law securities class actions asserting negligence in the making of forward-looking statements, then the protections of the PSLRA safe harbor "actual knowledge" requirement, *see* 15 U.S.C. § 78u-5(c)(1)(B), would be eviscerated. Such a result would run directly contrary to congressional intent. *See* 143 Cong. Rec. S10476 (daily ed. Oct. 7, 1997) ("[T]he prospect of State litigation where there is no safe harbor for forward looking statements is right now having a chilling effect upon corporate disclosure of projections and other forward looking information.") (Statement of Sen. Dodd).

3. Neither Congress nor Petitioner ever stated that SLUSA was intended to create "absolute uniformity." Resp. Br. at 36. It was the prerogative of Congress to preempt only class actions based on its explicit recognition that class actions impose a unique set of harms that individual actions do not. If Respondent disagrees with the congressional wisdom behind the enactment of SLUSA, legislative action is the proper recourse. Indeed, Respondent devotes a large portion of his brief to setting forth policy arguments that were already considered and rejected by Congress, and that apply equally

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7. Remarkably, the *amici* States cite Professor Painter's testimony as purported support that SLUSA created an exception for those plaintiffs that cannot meet the *Blue Chip Stamps* standing requirement. (States' Br. at 6, 10.) But despite his warning that the operation of *Blue Chip Stamps* together with SLUSA might mean that some investors would be deprived of both a federal and state class action remedy, Congress did not choose to state – either in the history or language of SLUSA – that state law holder class actions would remain after SLUSA as viable remedies for plaintiffs who do not satisfy the *Blue Chip Stamps* standing rule applicable to federal claims.

to state law class actions by purchasers and sellers, which indisputably are preempted by SLUSA.[8]

In particular, he argues in favor of allowing private investor class action remedies as an important deterrent to corporate malfeasance and as the only available remedies to many investors. But Congress expressly determined that many other effective remedies remain even with SLUSA preemption. As noted in the statute's findings, in addition to actions by state regulators, individual actions as well as the excepted actions (including derivative actions) remain as available private enforcement. *See* SLUSA § 2(4)-(5), 112 Stat. at 3227. Further, the modern trend toward arbitrating securities claim provides investors with available, non-preempted remedies.[9]

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8. Respondent's citation of Senator Dodd's statement (at 34), to the effect that the private litigation system was "important . . . in maintaining the integrity of our capital markets," actually undermines his argument because in the very next sentence Senator Dodd stated,

> It is precisely because of the importance of this system that the depths to which it had sunk by 1995 was so very troubling. The system was no longer a mechanism for aggrieved investors to seek justice and restitution, but was instead a means for enterprising attorneys to manipulate its procedures for their own considerable profit and to the detriment of legitimate companies and investors across the nation.

143 Cong. Rec. S10476; *compare* Resp. Br. at 34. *Compare also, e.g.*, Resp. Br. at 35 n.38 (excerpted Statement of Sen. D'Amato) *with* 144 Cong. Rec. S12445 (daily ed. Oct. 13, 1998) ("But we should not condone little more than a judicially sanctioned shakedown that only benefits strike lawyers" and "however, companies should not be forced to settle cases that have no merit just to minimize their losses.").

9. Indeed, Respondent's primary example of investors relying to their detriment on allegedly biased research advice is a settlement Merrill Lynch paid in an *arbitration* brought by an individual investor. (Resp. Br. at 10, 45 n.53.) "[A]rbitration in the securities industry as mandated by the U.S. Supreme Court has resulted in more, not less, protection for the investing public." Lewis D. Lowenfels & Alan R. Bromberg, *Beyond Precedent: Arbitral Extensions of Securities Law*, 57 Bus. Law. 999, 1008 (2002). This is consistent with this Court's recognition of the public policy favoring arbitration. *See, e.g., Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232-34 (1987).

Moreover, Congress gave far more credit to federal and state regulators in enforcing the securities laws than does Respondent. Respondent states that "[i]n April 2002, *before the SEC took action*, Dabit, a former Merrill Lynch broker, filed this suit in federal court" Resp. Br. at 15 (emphasis added). Of course, Mr. Dabit's action was only commenced *after* the New York Attorney General's investigation was made public. Moreover, in an effort to denigrate the efforts of regulators, Respondent criticizes the regulators' recovery of approximately $2 billion on behalf of mutual fund shareholders in so-called "market timing" cases. *See* Resp. Br. at 40-41; ICI *Amicus* Br. at 9 n.2 (in 2004, "the SEC and state regulators secured roughly $2.5 billion); *compare* 144 Cong. Rec. H6057 (daily ed. July 21, 1998) (Rep. Tauzin noting that 94% of securities class actions brought by the private securities class action bar were settled for "10 cents on the dollar").[10]

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10. Despite the amount of ink spilled on the subject of market timing by Respondent and his amici, neither the initial nor the amended complaint contained any allegations concerning market timing. Respondent's assertion (at 48) that he "may be able to plead" a state-law market timing claim or a host of other state law theories is pure speculation and should not be the basis of an advisory opinion by this Court. In any event, mutual fund investors have asserted other civil remedies for alleged market timing. *See Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005) ("[M]ost of the approximately 200 filed against mutual funds alleging [market timing] . . . have been filed in federal court under Rule 10b-5"), *petition for cert. filed* (U.S. Sept. 29, 2005) (No. 05-409). Mutual fund investors have also sought to bring derivative actions. *See In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 873 (D. Md. 2005) (dismissing derivative claims for failure to meet demand requirement). They have also brought individual actions. What they may not do is bring a state-law class action that is precluded by the plain terms of SLUSA. *See Kircher*, 403 F.3d at 483-84.

CONCLUSION

The decision of the court of appeals should be reversed in relevant part with instructions that the holder claims should be dismissed with prejudice.

Respectfully submitted,

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