No. 16-___

IN THE

Supreme Court of the United States

PATRICIA HOLTZ, ET AL.,

Petitioners,

v.

JPMORGAN CHASE BANK, N.A., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Securities Litigation Uniform Standards Act of 1998, prohibits state and federal courts from hearing class actions asserting state law claims if the plaintiffs are "alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The courts of appeals are avowedly in conflict over the proper test for determining when a complaint qualifies as "alleging" such a "misrepresentation or omission" when the state law cause of action (*e.g.*, breach of contract or fiduciary duty) does not require such a misrepresentation or omission as an element of the claim. The Question Presented is:

When is a party properly held to be "alleging" a "misrepresentation or omission of a material fact" within the meaning of 15 U.S.C. § 78bb(f)(1)(A)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patricia Holtz, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

The Securities Litigation Uniform Standards Act of 1998 (SLUSA), provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). Such claims must be brought either as individual actions or filed as federal securities class actions subject to the restrictions of the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 77z-1, 78u-4.

SLUSA is easy enough to apply when plaintiffs bring state law fraud claims. But applying it to other kinds of claims – particularly to contract and breach of fiduciary claims – has bedeviled the courts of appeals, resulting in a multifaceted circuit conflict. On the one hand, a misrepresentation or omission is not a required element of a breach of contract or fiduciary duty cause of action. And, indeed, a great many contract and fiduciary duty claims have nothing to do with misrepresentations or omissions. For example, a defendant may breach its contract to provide real-time stock market information by simply failing to deliver the promised information. *See, e.g.*, *Green v. Ameritrade, Inc.*, 279 F.3d 590, 593-94 (8th

Cir. 2002). On the other hand, misrepresenting or omitting a material fact can sometimes form the basis of a breach of contract or fiduciary duty claim. So many traditional securities fraud claims may be pled as breach of contract or breach of fiduciary duty claims.

In addition, even when a contract or breach of fiduciary duty claim does not depend on allegations of fraud, plaintiffs may sometimes include allegations of dishonesty in their complaints as background or for atmospheric effect (thereby arguably "alleging" a misrepresentation in a very literal sense). But a plaintiff wanting to avoid SLUSA preemption might leave out express allegations of misrepresentations or omissions in a complaint that nonetheless is premised on assertions of fraud.

In light of these complexities, figuring out when a state law contract or fiduciary duty claim is barred by SLUSA has tied the courts of appeals in knots. As Judge Hamilton explained in another recent Seventh Circuit case, the "question has produced at least a three- or four-way circuit split." *Goldberg v. Bank of Am., N.A.*, 846 F.3d 913, 922 (7th Cir. 2017) (Hamilton, J., dissenting), *reh. denied* (Feb. 21, 2017); *see also, e.g.*, *Brown v. Calamos*, 664 F.3d 123, 127-29 (7th Cir. 2011) (Posner, J.) (surveying conflict); *Daniels v. Morgan Asset Mgmt., Inc.*, 497 Fed. Appx. 548, 553 (6th Cir. 2012) ("The circuits have split on the role an untrue statement or omission of material fact must play in the complaint in order to find SLUSA preclusion." (citation omitted)).

"Only the Supreme Court can settle this" conflict. *Goldberg*, 846 F.3d at 925 (Hamilton, J., dissenting). It should do so in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is published at 846 F.3d 928. The opinion of the district court (Pet. App. 14a-25a) is unpublished, but available at 2013 WL 3240181.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2017. Pet. App. 1a. On April 16, 2017, Justice Kagan extended the time to file this petition through May 24, 2017. No. 16A979. On May 11, 2017, Justice Kagan further extended the time to file this petition through June 22, 2017. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 78bb(f)(1) of Title 15 provides in relevant part:

> (1) **Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private 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.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are individual investors who contracted with respondents (collectively "JPMorgan") to manage their investments. In exchange for management and advisory fees, JPMorgan promised to invest petitioners' money on the basis of independent, skilled investment analysis. Complaint ¶¶ 28-40.[1] In addition, because JPMorgan had undertaken a position of trust, it had a fiduciary obligation to act only in the interest of its clients, a duty it publicly recognized and incorporated into its contracts. *Id*. ¶¶ 21-27.

In choosing investments for their clients, petitioners' investment advisors could select funds managed by JPMorgan and its affiliates, or funds managed by unrelated entities. Putting clients into JPMorgan's proprietary funds was in JPMorgan's financial interest, but often not in the clients'. It was in JPMorgan's interest because in addition to collecting the fees it charged for the advisors' services, JPMorgan and its affiliates would charge fees for managing the investment funds. Clients, on the other hand, frequently would be better off invested in an outside fund, including because JPMorgan's funds often had much higher fees than their competitors'. *Id*. ¶¶42, 48, 70.

Recognizing this inherent conflict of interest, other major financial institutions, such as Morgan

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[1] The amended Complaint is reproduced at Pet. App. 26a-65a.

Stanley and Citigroup, refuse to invest clients' money in their own funds. *Id.* ¶ 43. Indeed, by 2011, the top ten largest fund companies had abandoned the practice, with the exception of JPMorgan. *Id.*

In the face of declining profits during the Great Recession, JPMorgan undertook a massive, centralized effort to push its individual investor clients into its own proprietary funds, whether those investments were in the best interest of the clients or not. *Id.* ¶¶ 41-48. As uncovered by the *New York Times*, JPMorgan established quotas and high bonuses for financial advisors who put clients into its proprietary funds. *Id.* ¶ 51. Under the company's compensation scheme, the vast majority of advisors' pay came as a result of such bonuses tied to the bank's interest rather than any measure of how successful the investments were for the clients. *Id.* ¶ 52. Advisors who put the most clients into proprietary funds were also singled out for internal recognition and praise, while those who continued to place their clients in unaffiliated funds were subject to enhanced supervision and even discipline. *Id.* ¶¶ 55-57, 60.

JPMorgan not only pressured advisors to put new clients into the bank's own funds but also pushed advisors to switch existing clients from non-affiliated funds to proprietary funds without considering whether the transactions costs (another source of revenue to JPMorgan) and other fees rendered the change a bad deal for the clients. *Id.* ¶¶ 69-74.

As a result of these policies and incentives, petitioners were not provided the independent investment research and analysis they paid for under their contracts. Indeed, JPMorgan instructed its advisors that no research or analysis of its proprietary funds was necessary. *Id.* ¶¶ 54, 58. In the end, instead of having their investments managed solely for their own benefit, petitioners' interests were subordinated to JPMorgan's desire to prop up its profits.

II. Procedural Background

1. Petitioners filed this class action in federal court, asserting solely state law claims, including for breach of contract and fiduciary duties. Pet. App. 3a, 60a-63a. The district court dismissed the suit under SLUSA and the Seventh Circuit affirmed. *See* Pet. App. 3a, 13a.

Writing for the court, Judge Easterbrook acknowledged that the Complaint included no cause of action for fraud, misrepresentation, or omission of a material fact. Pet. App. 3a. Nor were the breach of contract and fiduciary duty claims founded on any allegation of misrepresentation or omission in any ordinary sense. *Id.* That is, the Complaint did not allege, for example, that JPMorgan breached its fiduciary duty by making a false statement to the class. Instead, the Complaint simply alleged that JPMorgan "failed to provide the independent research, financial advice, and due diligence required by the parties' contract and their fiduciary relationship." *Id.*

But the court of appeals nonetheless held that "nondisclosure is a linchpin of this suit" because if JPMorgan "had told customers that its investment advisors were compensated more for selling the Bank's mutual funds than for selling third-party funds, plaintiffs would have no claim under either state or federal law." *Id*.

In making this assertion, the court did not claim that petitioner's causes of action would fail unless petitioners alleged such an omission.[2] Instead, it was sufficient that JPMorgan could defeat petitioners' claims by showing that it had disclosed the challenged practices at the outset of their relationship. *Id*. Not that the court claimed JPMorgan would (or could) actually defend the case on that ground. It was enough that the suit's ultimate success *theoretically* depended on the absence of such a disclosure. *Id*.

The Seventh Circuit seemingly recognized that this game could be played with respect to just about any contract or fiduciary duty claim, noting only two possible exceptions to its general preclusion rule: SLUSA would not apply if a defendant "broke its promise by mistake," Pet. App. 8a, or "if a decision to break the promise occurred after the promise had been made," *id*. 5a.

The court made little effort to square its rule with the language of the statute (which requires

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[2] *See, e.g.*, *Avila v. CitiMortgage, Inc*., 801 F.3d 777, 786 (7th Cir. 2015) ("The elements of a claim for breach of contract are (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff."); *Autotech Tech. Ltd. P'ship v. Automationdirect.com*, 471 F.3d 745, 748 (7th Cir. 2006) (elements of breach of fiduciary duty are "the existence of a fiduciary duty, breach of that duty, and damages proximately resulting from that breach").

actually "alleging" a misrepresentation or omission), focusing instead on its belief that sound policy required precluding petitioners' suit. *See* Pet. App. 5a-10a. In particular, the court focused at length on explaining why, in its view, petitioners' claims could have been brought as federal securities claims. *Id*.

2. The same day the decision in this case was announced, another Seventh Circuit panel with overlapping membership issued a divided decision in *Goldberg v. Bank of America, N.A.*, 846 F.3d 913 (2017). Applying the same rule, the *Goldberg* majority held the case before it was precluded by SLUSA because the contract and fiduciary duty claims "depend[ed] on the omission of a material fact," namely the defendant's intent to breach its contract and violate its fiduciary duties by keeping certain fees it should have transmitted to its customers. *Id*. at 915.

Judge Hamilton dissented. He observed that under "*Goldberg* and *Holtz*, now, virtually any breach of contract claim is preempted. If the defendant had told the plaintiff what it was actually doing, the plaintiff's acquiescence could have been treated as a modification or waiver of the relevant contract terms." *Id*. at 924 (Hamilton, J., dissenting). This, he noted, is not the law in other circuits. In fact, he explained, the "opinions in this case and *Holtz*[] widen an already existing circuit split under SLUSA," employing "logic that other circuits have rejected." *Id*. at 921. That conflict, he noted, could only be resolved by this Court. *Id*. at 925.

REASONS FOR GRANTING THE WRIT

The courts of appeals have divided three ways over the proper test for determining when a complaint should be seen as alleging a misrepresentation or material omission, so as to qualify for SLUSA preclusion. The conflict is intolerable and will not be resolved without this Court's intervention. At the same time, although the scope of SLUSA preclusion is a recurring question in the lower courts, opportunities for this Court to resolve the conflict will not arise nearly as often – if a district court concludes SLUSA is no bar, it will often remand the case to state court, a decision that cannot be appealed. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640-45 (2006). The Court should embrace this opportunity to put an end to the arbitrary treatment and forum shopping the circuit conflict necessarily fosters.

I. The Circuits Are Intractably Divided Over The Test For Deciding When A Party Is "Alleging A Misrepresentation Or Omission Of A Material Fact" Under SLUSA.

As Judge Hamilton noted in his *Goldberg* dissent, discerning whether a party has alleged a misrepresentation or material omission within the meaning of SLUSA "has produced at least a three- or four-way circuit split." *Goldberg v. Bank of Am., N.A.*, 846 F.3d 913, 922 (7th Cir. 2017) (Hamilton, J., dissenting).

A. The Majority Approach of the Second, Third, and Ninth Circuits.

The majority of circuits ask a straightforward question: whether "the plaintiffs can prevail on their claims without proving the defendants engaged in deceptive misrepresentations or omissions." *Id.* at 921 (citations omitted). If so, the suit is not precluded, even if it contains extraneous allegations of false statements or material omissions, and even if the plaintiff may have been able to draft a complaint that would have alleged securities fraud.

1. Second Circuit

In re Kingate Management Ltd. Litigation, 784 F.3d 128 (2d Cir. 2015), arose from the Bernie Madoff ponzi scheme. As relevant here, the class action complaint included allegations of breach of contractual and fiduciary duties. *Id*. at 135. In deciding whether those counts were barred by SLUSA, the court recognized that the statute's "broad, general terms are in some respects ambiguous, so that it is not always easy to understand whether SLUSA applies." *Id*. at 136. In particular, the statute's reference to parties "alleging" misrepresentation or material omission is "susceptible to" multiple "interpretations." *Id*. at 143.

First, "on the broadest of interpretations, 'alleging' could mean that SLUSA applies to any claim that includes any reference whatsoever to the false conduct specified in SLUSA, even if the false conduct is completely irrelevant to the state law theory of the defendant's liability." *Id*.

Second, the statute could preclude complaints "alleg[ing] conduct by the defendant" that amounts to a misrepresentation or material omission "*and* that forms the basis for the defendant's state law liability." *Id*. at 144 (emphasis in original). In other words, when "the success of a class action claim depends on a showing that the defendant committed false conduct conforming to SLUSA's specifications, the claim will be subject to SLUSA, notwithstanding that the claim asserts liability . . . under a state law theory that does not include false conduct *as an essential element*." *Id*. at 149 (emphasis in original).[3]

To the extent other courts might have adopted the first interpretation, the Second Circuit explained, "we respectfully disagree." *Id*. at 146. Instead, the court adopted the second interpretation. "In our view," the Second Circuit explained, "the history and the purposes of this provision all favor interpreting it to apply to state law claims predicated on conduct by the defendant that is specified in SLUSA's operative provisions." *Id*. (emphasis omitted).[4]

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[3] The court also noted a third possibility: SLUSA might apply even when the complaint alleges someone *other* than the defendant made a misrepresentation or omission, if that the misrepresentation or omission "must be proved in order for the state law claim" against the defendant "to succeed." *Id*. at 143. The distinction between misrepresentations made by the defendant and someone else does not arise in this case.

[4] New York's highest court has adopted the same interpretation. *See RGH Liquidating Trust v. Deloitte & Touche LLP*, 995 N.E.2d 329, 333-34 (NY 2011) (SLUSA bars suit when, "although not an essential element of the claim, the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim") (citation omitted).

2. Third Circuit

In *Rowinski v. Salomon Smith Barney*, 398 F.3d 294 (3d Cir. 2005), the Third Circuit likewise held that where "allegations of a material mispresentation serve as the factual predicate of a state law claim, the misrepresentation prong is satisfied under SLUSA." *Id*. at 300. Under that standard, the court explained, it did not matter that misrepresentation "is not an essential legal element" of the claim; it is enough that to succeed in their particular claims, the plaintiffs must prove the misrepresentation. *Id*.

The Third Circuit reiterated this rule in *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008). SLUSA applies when a complaint includes "an allegation of a misrepresentation in connection with a securities trade" and that allegation "is a 'factual predicate' of the claim, even if misrepresentation is not a legal element of the claim." *Id*. at 141 (quoting *Rowinski*, 398 F.3d at 300). "Thus, when, as in *Rowinski*, a plaintiff alleges that a misrepresentation made in connection with a securities trade breaches a contract, the plaintiff cannot avoid SLUSA preemption by arguing that misrepresentation is not an element of a breach-of-contract action." *Id*.

However, the court held, SLUSA preemption does not apply simply because "a misrepresentation is alleged," if the allegation is unnecessary to the plaintiffs' state law claims. *Id*. The "inclusion of such extraneous allegations does not operate to require that the complaint must be dismissed under SLUSA." *Id*.

3. Ninth Circuit

The Ninth Circuit applies the same rule. In *Freeman Investments, L.P. v. Pacific Life Insurance Co.*, 704 F.3d 1110 (9th Cir. 2013), that court addressed whether "SLUSA displace[s] class actions alleging breach of a variable universal life insurance contract." *Id*. at 1113. Under those policies, the defendant insurance company invested a portion of the premiums on the customer's behalf, for which it was entitled to charge certain fees. The plaintiffs brought a breach of contract suit, alleging that the defendant had overcharged them. The Ninth Circuit held that although the insurance contracts qualified as covered securities under SLUSA, the breach-of-contract claims were not barred because they did not depend on allegations of misrepresentation or material omission. *Id*. at 1115.

Writing for the court, Judge Kozinsky agreed with "our sister circuits" that SLUSA "operates wherever deceptive statements or conduct form the gravamen or essence of the claim." *Id*. (citing *Rowinski*, 389 F.3d at 299-300). In the case before it, the court held, the breach of contract claim "alleges that Pacific charged them too much," in violation of their contract. SLUSA did not apply because in order to "succeed in this claim, plaintiffs need not show that Pacific misrepresented the cost of insurance or omitted critical details." *Id*.

The court specifically rejected any suggestion that SLUSA applied because the plaintiffs were, in effect, alleging that the defendant omitted to inform its clients how much it would be charging under its interpretation of the contract. *See id*. Although the defendant may have had a different understanding of the contract from the outset, "that does not mean one party omitted a material fact by failing to anticipate, discover and disabuse the other of its contrary interpretation of a term of the contract." *Id*. (citation omitted). "Just as plaintiffs cannot avoid SLUSA through crafty pleading," the court cautioned, "defendants may not recast contract claims as fraud claims by arguing that they 'really' involve deception or misrepresentation." *Id*. at 1116.

B. The Sixth Circuit's Literalist Approach.

The Sixth Circuit takes an avowedly contrary, "literalist approach" that "authorizes a more expansive reading of SLUSA's reach than other circuits have adopted." *Daniels v. Morgan Asset Management, Inc.*, 497 Fed. Appx. 548, 553 (6th Cir. 2012) (citation omitted).

In *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), *reh. denied* (Dec. 16, 2009), the Sixth Circuit ruled that a complaint alleging breach of contract and fiduciary duty was barred by SLUSA because it included assertions that the defendants had "made misrepresentations" in connection with the sale of covered securities. *Id*. at 310. Judge Sutton's opinion acknowledged that the "state-law claims do not depend upon allegations of misrepresentation or manipulation – and thus are not material to them." *Id*. at 311. But that made no difference: the statute asks only "whether the complaint includes these types of allegations pure and simple." *Id*.

The court acknowledged the Third Circuit's decision in *LaSala*, which took the position that "the inclusion of . . . extraneous allegations [of misrepresentation] does not operate to require that the complaint must be dismissed under SLUSA." *Segal*, 581 F.3d at 311-12 (quoting *LaSala*, 519 F.3d at 141). But the Sixth Circuit concluded that any such rule was inconsistent with the language of the statute, which, the court believed, should be given broad preclusive effect. *Id*.[5]

In subsequent cases, the Sixth Circuit has confirmed that it meant what it said in *Segal*. *See Atkinson v. Morgan Asset Management, Inc.*, 658 F.3d 549, 555 (6th Cir. 2011) ("Applying *Segal*, SLUSA precludes Plaintiffs' claims because they include allegations of misrepresentations and omissions, 'pure and simple.'" (citing 581 F.3d at 311)); *Daniels*, 497 Fed. Appx. at 553 ("[T]he literalist approach of our circuit makes it clear that the inquiry is only whether the complaint includes these types of allegations, not whether they are material elements of a claim." (citation omitted)).

That said, the Sixth Circuit applies the statute literally only when doing so bars a plaintiff's claim: any express reference to a misrepresentation results in preclusion, but failing to include an express

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[5] The Sixth Circuit stated that *LaSala*'s treatment of extraneous allegations was dicta, inconsistent with *Rowinski*. *See Segal*, 581 F.3d at 312. But the discussion in *LaSala* was an alternative ground for reversal, not dicta. *See LaSala*, 519 F.3d at 140-41; *Mariana v. Fisher*, 338 F.3d 189, 201 (3d Cir. 2003) ("[A]n alternate holding has the same force as a single holding; it is binding precedent.") (citation omitted). Moreover, for the reasons *LaSala* explained, its explication of the Third Circuit's rule was completely consistent with the prior decision in *Rowinski*. *See LaSala*, 519 F.3d at 141.

reference will not avoid preclusion so long as the "substance of the complaint's allegations" involves misrepresentations or material omissions. *Segal*, 581 F.3d at 310-11.

C. The Seventh Circuit's Implied Omission Approach

The Seventh Circuit has rejected both the majority and the literalists approaches, adopting a position that effectively eliminates most contract and fiduciary duty claims, regardless of what the complaint actually alleges.

1. In *Brown v. Calamos*, 664 F.3d 123 (7th Cir. 2011), Judge Posner surveyed the then-existing conflict between the "literalist approach . . . taken by the Sixth Circuit" and the "contrary approach taken by the Third Circuit" (later to be joined by the Second and Ninth Circuits). *Id*. at 127.[6] The court rejected the literalist approach as adopting an impractical conception of what counts as an "allegation." *Id*. at 128. But it would not go so far as the Third Circuit and hold that SLUSA applied only when the state law claims depended on a factual allegation of misrepresentation or omission. Instead, the court held that a suit is barred by SLUSA whenever a court

[6] He also reviewed what he called the "intermediate approach" of a non-precedential Ninth Circuit opinion, which he described as "tak[ing] off from the literalist approach" but "permitting the plaintiff to file an amended complaint that contains no allegation of a misrepresentation or misleading omission." *Id*. at 127. Since then, however, the Ninth Circuit has joined the majority position through its precedential opinion in *Freeman*, *see supra* § I.A.3.

concludes that a "misleading omission is . . . alleged, *at least implicitly*," *id*. at 127 (emphasis added), and it "is *likely* that an issue of fraud will arise in the course of the litigation." *Id*. at 128-29 (emphasis added).

In the case before the court, the plaintiffs alleged that managers of an investment fund violated their fiduciary duties by taking action that favored certain investment banks and brokers with whom the managers were in litigation, at the expense of other investors. *Id*. at 125-26. Judge Posner concluded that the complaint implicitly alleged misrepresentations and omissions regarding how the fund would be managed, *id.*, while nonetheless recognizing that those allegations were not material to the claims the plaintiffs actually made. *See id*. at 129 (explaining that the omitted "disclosures would be ineffectual against a claim of breach of the duty of loyalty because that duty is not dissolved by disclosure ('we are disloyal – *caveat emptor*!')").

Under the majority rule, that would have ended the SLUSA analysis, but Judge Posner carried on, launching into a detailed examination of the merits of the breach of loyalty claim. He concluded that the claims, as actually alleged, "might not be plausible." *Id*. at 130. Accordingly, he reasoned, to save their case, the plaintiffs might need to rely on the implied omission allegation. And because the "fraud allegations *may* be central to the case," the suit was "therefore barred by SLUSA under any reasonable standard." *Id*. (emphasis added).

2. The decisions in this case and *Goldberg* took the Seventh Circuit's already peculiar precedent one step further. *See Goldberg*, 846 F.3d at 924

(Hamilton, J., dissenting).[7] In both cases, the parties alleged very straight-forward breach of contract and fiduciary duty claims – here, alleging that the defendants did not provide the unbiased investment services required by contract and the defendants' fiduciary duties; in *Goldberg*, that the defendant charged more for its services than the contract allowed. In neither case were the plaintiffs required to establish a misrepresentation or omission in order to prove these claims. *See supra* p. 7 n.2. It was enough to show that the defendants did not provide the services promised under the terms agreed to.

Nonetheless, the Seventh Circuit held both actions barred because the plaintiffs would lose if the *defendants* demonstrated that they had disclosed at the outset the conduct giving rise to the plaintiffs' claims. Given the possibility of that hypothetical defense, the Seventh Circuit concluded that the complaints were "alleging . . . omission of a material fact," 15 U.S.C. § 78bb(f)(1)(A), even though nothing in the law of contracts or trusts required the plaintiffs to make or prove that allegation in order to prevail. Pet. App. 3a; *Goldberg*, 846 F.3d at 915.

3. The effect of these decisions is to subject all breach of contract and fiduciary duty claims to SLUSA preemption unless the breach occurs by mistake or the decision to breach arises after the client relationship is formed.

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[7] Judge Hamilton's reference to a "three- or four-way split" treats the Seventh Circuit as having adopted two conflicting approaches. *See Goldberg*, 846 F.3d at 922 (Hamilton, J., dissenting).

Judge Hamilton rightly observed that under "*Goldberg* and *Holtz*, now, virtually any breach of contract claim is preempted." *Goldberg*, 846 F.3d at 924. "If the defendant had told the plaintiff what it was actually doing, the plaintiff's acquiescence could have been treated as a modification or waiver of the relevant contract terms." *Id*. And under the Seventh Circuit's reasoning, whenever that is true, any breach of contract claim will be treated as impliedly alleging an omission – *i.e.*, that the defendant failed to disclose its plan to engage in the conduct that breached the contract. That leaves only breaches caused by mistake or a decision made after the contract was formed. Pet. App. 5a, 8a.

The Seventh Circuit was even more emphatic that its interpretation precluded all duty of loyalty claims, emphasizing its belief that there is no "nondisclosure or fiduciary-duty claim concerning investments in securities, traded in interstate commerce, that is outside the scope of federal securities law." *Id*. 10a.

4. The Seventh Circuit thus stands alone and in conflict with every other circuit to have considered the Question Presented. It expressly rejected the Sixth Circuit's literalist approach in *Brown*, 664 F.3d at 128. And its interpretation of SLUSA cannot be reconciled with the law in the Second, Third, and Ninth Circuits.

a. This case aptly illustrates the conflict. The Seventh Circuit did not contend that misrepresentation or omission is an element of a breach of contract or fiduciary duty claim. Under the majority rule, then, SLUSA could only apply if petitioners had nonetheless alleged a misrepresentation or material omission as "a factual predicate of the claim[s]." *LaSala*, 519 F.3d at 141 (quoting *Rowinski*, 398 F.3d at 300). "To be a factual predicate [to a legal claim], the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail." *Id*. In this case, the Complaint contains no allegation of a misrepresentation that was material or essential to the success of petitioners' state law claims. Instead, petitioners straightforwardly allege that they contracted for independent, skilled research and investment advice, but did not get it. Complaint ¶¶ 88-89, 94. That failure breached the contract, plain and simple. No misrepresentation or omission needed to be proven. *See supra* p. 7 n.2.

Similarly, all petitioners had to prove to establish a breach of fiduciary duty claim was "the existence of a fiduciary duty, breach of that duty, and damages proximately resulting from that breach." *Autotech Tech. Ltd. P'ship v. Automationdirect.com*, 471 F.3d 745, 748 (7th Cir. 2006) (citation omitted). Here, they did that by alleging JPMorgan invested their savings into proprietary funds in furtherance of its own, rather than petitioners', best interests. Pet. App. 3a; Complaint ¶ 94. The claims thus turns on what respondents *did*, not anything they said or omitted.

The Seventh Circuit found an omission in this case only by moving beyond what petitioners alleged as "a 'factual predicate' of the claim," *LaSala*, 519 F.3d at 141 (quoting *Rowinski*, 398 F.3d at 300), and considering hypothetical defenses a defendant might raise (*i.e.*, full disclosure). That inquiry is not permitted under the majority rule and was explicitly rejected by the Ninth Circuit in *Freeman*. In that case, Judge Kozinksi recognized that in every contract action it could be said that the defendant "omitted a material fact." 704 F.3d at 1115 (citation omitted). But he rejected the defendants' attempt to "recast contract claims as fraud claims by arguing that they 'really' involve deception or misrepresentation." *Id*.

b. The conflict is also laid bare by asking how cases in other circuits would have fared under the Seventh Circuit's rule. In *Freeman*, for example, the plaintiffs alleged the defendant breached its insurance contract by "levying excessive cost of insurance charges." *Id*. at 1114. In the Seventh Circuit, that claim would have been barred by SLUSA on the ground that if the defendant had disclosed what it planned to charge at the outset, the plaintiffs would have no contract claim. *See Goldberg*, 846 F.3d at 915 (plaintiffs' claims barred because they "depend[] on the omission of a material fact," namely that "the Bank kept [the] fees" not authorized by the fee schedule in the contract). But the Ninth Circuit allowed the claim to proceed.

Likewise, the Seventh Circuit's rule is irreconcilable with the Third Circuit's decision in *LaSala*. There, the court held that SLUSA did not preclude plaintiffs from pursuing claims against several Swiss banks under the Swiss-law equivalent of a breach of fiduciary duty standard. 519 F.3d at 140-41. Although the complaint alleged that the banks knowingly assisted their co-defendants in money-laundering scheme that involved multiple false statements, the Third Circuit held that those "prior alleged misrepresentations are not factual predicates to these claims because . . . they have no bearing on whether the Banks' conduct is actionable" under the pleaded fiduciary duty theory. *Id*. at 141. The Seventh Circuit, on the other hand, would have held the claims barred under SLUSA because the defendants could have avoided liability by showing they had disclosed their planned conduct at the outset. *See* Pet. App. 3a.

D. The Circuit Conflict Is Entrenched And Will Not Be Resolved Without This Court's Intervention.

The conflict is long-standing and widely acknowledged. *See, e.g.*, *Goldberg*, 846 F.3d at 922-25 (Hamilton, J., dissenting) ("This question has produced at least a three- or four-way circuit split."); *id.* at 919-20 (Flaum, J., concurring) (describing split); *Brown*, 664 F.3d at 127 (Posner, J.) (same); *Daniels*, 497 Fed. Appx. at 553 ("The circuits have split on the role an untrue statement or omission of material fact must play in the complaint in order to find SLUSA preclusion."); 1 MCCLAUGHLIN ON CLASS ACTIONS § 2:44 (13th ed.) ("Courts have employed several rival approaches to evaluate whether a complaint's allegations trigger SLUSA preclusion."); 4 TREATISE ON THE LAW OF SECURITIES REGULATION § 12:44 (2017) (describing conflict); 1 PUBLICLY TRADED CORPORATIONS HANDBOOK § 7:42 (2017) ("The circuit courts are split 'on the role [of] an untrue statement or omission of material fact' . . . [in SLUSA preclusion analysis].") (citation omitted).

At present, the viability of breach of contract and fiduciary duty class actions involving securities depends entirely on where the lawsuit was filed.

That arbitrariness is itself intolerable, but it also creates an incentive for forum shopping, something SLUSA was enacted to prevent. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006).

There is no prospect of the split resolving itself. The conflicting decisions acknowledge, but expressly disagree, with contrary precedent from other circuits. *See, e.g., Kingate*, 784 F.3d at 146 (Second Circuit expressly disagreeing with the Sixth Circuit's literalist approach); *Brown*, 664 F.3d at 127 (Posner, J.) (acknowledging, but disagreeing with other circuits' precedents); *Segal*, 581 F.3d at 312 (Sutton, J.) (Sixth Circuit expressly disagreeing with statement of law in Third Circuit's decision in *LaSala*). And the circuits have denied petitions for rehearing en banc in cases making up the split. *See, e.g.*, *Goldberg*, 846 F.3d at 913, *reh. denied* (Feb. 21, 2017); *Segal*, 581 F.3d at 305, *reh. denied* (Dec. 16, 2009).

II. The Question Presented Is Recurring And Important.

Certiorari is also warranted because the scope of SLUSA's preclusive effect is a recurring and critically important question of federal law.

The breadth of the circuit conflict reflects the frequency with which the Question Presented arises in the lower courts. *See supra* § I; *see also, e.g.*, *Rayner v. E*TRADE Fin. Corp.*, No. 16-CV-7129 (JGK), 2017 WL 1232730, at *3 (S.D.N.Y. Apr. 3, 2017); *Merryman v. J.P. Morgan Chase Bank, N.A.*, No. 15-CV-9188 (VEC), 2016 WL 5477776, at *6 (S.D.N.Y. Sept. 29, 2016); *Lewis v. Scottrade, Inc.*, 204 F. Supp. 3d 1064, 1068 (E.D. Mo. 2016); *Zola v. TD Ameritrade, Inc.*, 172 F. Supp. 3d 1055, 1072 (D. Neb. 2016), *appeal dismissed* (May 18, 2016); *Zweiman v. AXA Equitable Life Ins. Co.*, 146 F. Supp. 3d 536, 548 (S.D.N.Y. 2015); *Lerner v. TD Ameritrade, Inc.*, No. 8:14CV325, 2015 WL 12732467, at *3 (D. Neb. Aug. 20, 2015); *Knopick v. UBS Fin. Servs., Inc.*, 121 F. Supp. 3d 444, 455 (E.D. Pa. 2015); *Handal v. State St. Bank & Trust Co.*, 941 F. Supp. 2d 167, 184 (D. Mass. 2013).

Whether the Seventh Circuit's rule is correct is particularly important because it effectively precludes all relief for investors injured by breaches of contract or fiduciary obligations unaccompanied by bad faith or scienter. For example, investment advisors breach their contract whenever they fail to provide the services their customers contract for, whether they do so in bad faith or not. And they can breach their fiduciary duties through mere negligence. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(2), 173 cmt. d. Yet, class actions alleging such violations will be barred by SLUSA under the Seventh Circuit's rule whenever the defendant could have avoided liability by disclosing its breaching conduct in advance. *See* Pet. App. 3a. While investors would be permitted to file individual state law claims, *id.* 12a, the cost of litigating such a case generally exceeds any potential recovery, making individual suits an illusory option. Investors would be permitted to file a federal securities class action instead, but the lack of scienter would doom that lawsuit to failure. *See* Pet. App. 10a.

The court of appeals' interpretation of SLUSA thus wipes out a significant body of long-standing state law protection for investors even though federal securities law provides no substitute protection. Whether this was Congress's intent is an important question that should be decided by this Court.

III. This Case Presents An Ideal Vehicle For Resolving The Conflict.

The circuit conflict is squarely presented on the facts of this case, providing the Court an ideal opportunity to resolve the split.

As discussed, although dismissed under the Seventh Circuit's construction of SLUSA, petitioners' case would have survived under the majority rule of the Second, Third, and Ninth Circuits. *See supra* § I.C.4.

The case also squarely presents the conflict over the propriety of the Sixth Circuit's "literalist" approach. Respondents argued below that the Complaint contained numerous allegations of misrepresentations of the type the Sixth Circuit would hold sufficient to invoke SLUSA. *See* Resp. C.A. Br. 6-8 (pointing to allegations concerning defendants' public representations that they provided individualized advice based solely on client's interests) (citing, *e.g.*, Complaint ¶¶ 23-24, 26, 34-39); *Segal*, 581 F.3d at 311. As petitioners explained to the Seventh Circuit, those allegations were simply included to demonstrate that the *existence* of a fiduciary relationship was undisputed and that respondents had incorporated those common law duties into their contracts. *See* Petr. C.A. Reply Br. 4-8. They were not necessary to prove breach of contract or fiduciary duty. *See id*. But in the Sixth Circuit, allegations of misrepresentation trigger

SLUSA preclusion even if they are not "material" to the plaintiffs' causes of action. *Segal*, 581 F.3d at 311.

IV. The Decision Below Is Wrong.

The Seventh Circuit's decision particularly warrants review because it is so obviously wrong, casting aside the text of the statute in favor of what that court believes to be the most appropriate scope of SLUSA preclusion given its purposes.

1. SLUSA applies only when a plaintiff is "alleging" misrepresentations or omissions. *See* 15 U.S.C. § 78bb(f)(1)(A). The majority of circuits (including the Seventh Circuit) have rightly recognized that the word "alleging" refers to "charges of misconduct for which the plaintiff is seeking relief," *Brown*, 664 F.3d at 128, not every statement in a complaint. There is no reason to think Congress was concerned about the effects of *immaterial* allegations, particularly when a plaintiff could simply avoid preclusion by repleading.

At the same time, the majority of circuits have appropriately rejected the argument that SLUSA only applies when a plaintiff pursues a cause of action for which a misrepresentation or material omission is a necessary element. A party asserting fraudulent conduct to prove up any cause of action is properly seen as "alleging" a misrepresentation or omission because it is asserting that fact as a basis for relief. *See id*.

The Seventh Circuit departs from the majority approach and the text of the statute by contending that a plaintiff is implicitly "alleging" a misrepresentation or omission whenever a defendant could hypothetically raise a disclosure defense that the plaintiff would have to controvert in order to prevail on the merits. Even if it were clear that the defendant could prevail on such a defense,[8] that prospect says nothing about what the plaintiffs are, in fact, "alleging." What a plaintiff is alleging turns on the allegations she has made, not on what a court supposes she may allege in the future.[9]

The Seventh Circuit's reasoning is all the more indefensible because it is far from inevitable that a defendant would raise a disclosure defense rather than, for example, denying it engaged in self-dealing. And if the defendant never claims to have made a disclosure, the plaintiff will never have occasion to allege an omission.

2. In the end, the Seventh Circuit's finding of "implied" allegations of omissions in cases like this one is simply a fudge to allow the court to implement its view of the proper scope of SLUSA preemption, which turns not on what the complaint alleges, but on whether the plaintiff *could have* brought claims

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[8] In fact, Judge Easterbrook's premise (Pet. App. 3a, 6a) that disclosure would have precluded petitioners' breach of fiduciary duty claim is wrong. *See Brown*, 664 F.3d at 129 (explaining that "disclosures would be ineffectual against a claim of breach of the duty of loyalty because that duty is not dissolved by disclosure") (collecting authorities).

[9] If a plaintiff amends her complaint, or seeks to prove up her complaint through allegations of fraud later in the case, the defendant is free to raise SLUSA preclusion at that time. *See* 15 U.S.C. § 78bb(f)(1) (providing that a no action "may be *maintained* in any State or Federal court" if it meets SLUSA's criteria) (emphasis added).

for federal securities fraud on the facts of the case. *See, e.g.*, Pet. App. 7a (explaining that contract claims barred by its rule are "a staple of federal securities law"); *id*. 10a ("Holtz has not pointed to any nondisclosure or fiduciary-duty claim concerning investments in securities, traded in interstate commerce, that is outside the scope of federal securities law."). In the Seventh Circuit's view, SLUSA would be "ineffectual" if plaintiffs with arguable federal securities fraud claims could pursue state law claims based on the same course of conduct without triggering preclusion. Pet. App. 4a-5a.

The problem is that the statute does not ask whether the plaintiff *could have* brought a federal securities fraud claim; it asks whether the plaintiff *did* allege a misrepresentation or material omission. In drafting the statute in that way, Congress unambiguously allowed plaintiffs to avoid SLUSA preclusion by declining to bring claims dependent on allegations of misrepresentation or material omissions.

The Seventh Circuit is wrong in thinking that applying the statute as written will fail to promote Congress's goal of preventing plaintiffs from avoiding the PSLRA by simply filing their securities fraud claims in state court. The majority rule faithfully implements the statutory language while also furthering that basic purpose by finding preclusion whenever liability is premised on the functional equivalent of the essential elements of a federal securities action (*i.e.*, a misrepresentation or material omission in connection with a securities sale).

The Seventh Circuit is not at liberty to "replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Henson v. Santander Consumer USA Inc.*, No. 16-349, slip op. 9 (U.S. June 12, 2017) (internal punctuation and citation omitted).

Here, it is easy to understand why Congress elected not to enact the statute the Seventh Circuit believes it should have written. The Seventh Circuit's nebulous speculation about what issues are "likely" to arise in the case, how a defendant might respond to the allegations, or what other allegations the facts might have supported, is entirely unadministrable. *See Goldberg*, 846 F.3d at 927 (Hamilton, J., dissenting). Moreover, even when properly applied, SLUSA seriously invades State sovereignty, dictating to States how they must adjudicate state law claims in their own courts (*i.e.*, on an individual basis) in contravention of the State's own judgment about how best to protect its citizens and conserve its judicial resources. Accordingly, this Court has held that although SLUSA is not to be given a begrudging construction, its limits must also be respected out of deference to states' traditional role in enforcing common law obligations. *See Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068-69 (2014); *see generally Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1563 (2016).

Here, petitioners pursue the kinds of contract and fiduciary duty claims that fall in the heartland of traditional state authority that SLUSA, by its plain terms, does nothing to displace. *See Goldberg*, 846 F.3d at 926 (Hamilton, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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