No. 16-1536

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

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition does not identify all parties to this proceeding. Petitioners are Patricia Holtz, the Aunt Marlene Foundation, Steven Greenspon, and Terence Heuel, each individually and on behalf of others similarly situated.

Respondents are JPMorgan Chase Bank, N.A.; JPMorgan Securities LLC; JPMorgan Chase & Co.; and JPMorgan Investment Management Inc.

CORPORATE DISCLOSURE STATEMENT

JPMorgan Chase & Co. is the parent company of JPMorgan Chase Bank, N.A.; JPMorgan Asset Management Holdings Inc.; and J.P. Morgan Broker-Dealer Holdings Inc. JPMorgan Asset Management Holdings Inc. is the parent company of J.P. Morgan Investment Management Inc. J.P. Morgan Broker-Dealer Holdings Inc. is the parent company of J.P. Morgan Securities LLC.

J.P. Morgan Chase & Co. is the only publicly held company that owns either directly or indirectly 10 percent or more of J.P. Morgan Securities LLC's, JPMorgan Chase Bank, N.A.'s, and J.P. Morgan Investment Management Inc.'s stock. No entity owns 10 percent or more of JPMorgan Chase & Co.'s stock.

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STATEMENT

A. Statutory Background

In 1995, Congress enacted the Private Securities Litigation Reform Act, or PSLRA, Pub. L. No. 104-67, 109 Stat. 737. It did so in order to curb "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," a vehicle that "was being used to injure the entire U.S. economy." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quotation marks omitted). The PSLRA imposed restrictions on certain securities-fraud class actions, such as heightened pleading standards, limited attorney's fees, and mandatory sanctions for frivolous claims. *Id.* (citing 15 U.S.C. §78u-4).

Enactment of the statute, however, "had an unintended consequence: It prompted … the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court." *Dabit*, 547 U.S. at 82. Congress responded by enacting the Securities Litigation Uniform Standards Act of 1998, or SLUSA, Pub. L. No. 105-353, 112 Stat. 3227. As the law itself states, SLUSA was intended to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the PSLRA. *Id.* §2(2), (5), 112 Stat. at 3227, *quoted in Dabit*, 547 U.S. at 82.

Congress sought to accomplish this goal largely through the statute's "core provision," which prevents class-action plaintiffs from repleading certain federal securities-fraud claims under state law. *Dabit*, 547 U.S. at 82. That provision provides: "No covered class action based upon the … law of any State … may be maintained in any … court by any private party alleging" either "(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." 15 U.S.C. §78bb(f)(1). In other words, SLUSA prevents courts from hearing state-law class-action claims that seek redress for alleged misrepresentations, omissions, or deceptive conduct in connection with nationally traded securities.

B. Factual Background[1]

Respondents (hereafter JPMorgan) provide clients with investment advice and manage their portfolios of securities. Pet. App. 32a-34a. JPMorgan's affiliates offer mutual funds—i.e., collections of securities—in which JPMorgan's clients can invest. Pet. App. 34a. Petitioners (hereafter Holtz) are investors who purchased JPMorgan's investment management and advisory services, and invested in the funds of JPMorgan affiliates. Pet. App. 31a-32a.

According to Holtz's complaint, JPMorgan represented that its employees provide impartial investment services and act in clients' best interests, without favoring investments in the funds of JPMorgan affiliates over better investments in other funds. For example, JPMorgan stated in marketing materials that it was "steadfastly committed to putting our clients' interests first" and would "not compromise their interests." Pet. App. 37a. It also stated in a filing with the Securities and Exchange Commission that "JPMorgan funds are evaluated on the same criteria as unaffiliated funds." Pet. App. 42a.

However, the complaint alleges, JPMorgan actually caused its employees to favor its own interests over clients'. More specifically, the complaint alleges that JPMorgan instituted policies and practices that both pressured employees and gave them incentives to "push," "steer," or "switch" clients' investments into the funds of JPMorgan affiliates, even when those

[1] The following recitation is drawn from the factual allegations in the operative complaint, which must be accepted as true here because the petition arises from a dismissal under Federal Rule of Civil Procedure 12(b)(6). *See Zinermon* v. *Burch*, 494 U.S. 113, 118 (1990).

funds had higher fees, lower returns, or were otherwise worse investments for clients than other funds. Pet. App. 28a-31a. "At the heart of such policies and practices," the complaint charges, "was the decision—made at the most senior executive levels—to require [JPMorgan's] financial advisors to strongly push and sell their clients into [JPMorgan's] own proprietary funds and investments, as opposed to those … managed by third parties." Pet. App. 28a. For example, the complaint alleges, JPMorgan compensated employees more for selling JPMorgan affiliates' funds than for selling other funds; instructed employees "to sell this or that JPMorgan proprietary fund above all else"; and subjected them to "disciplinary action" if they failed to do so. Pet. App. 50a-51a. According to the complaint, JPMorgan pursued this conduct so that it could collect additional fees from increased investments in its affiliates' funds. Pet. App. 44a-47a.

C. Proceedings Below

1. Holtz filed this putative class action in the Northern District of Illinois on behalf of individuals nationwide who invested in the funds of JPMorgan affiliates and purchased JPMorgan's investment management and advisory services. Pet. App. 27a. Holtz did not assert any federal claims, instead asserting a state-law claim for breach of contract under both New York law and "general contract law," as well as state-law claims for breach of fiduciary duty and unjust enrichment. Pet. App. 60a-63a.

Holtz's lawsuit is a "covered class action" under SLUSA because it seeks damages on behalf of the class and involves a "covered security," namely the nationally traded securities in the mutual funds of JPMorgan affiliates. *See* 15 U.S.C. §78bb(f)(5)(B), (E). JPMorgan therefore moved to dismiss Holtz's complaint under SLUSA.

The district court agreed that SLUSA barred Holtz's claims and accordingly dismissed the action. Pet. App. 14a-24a. The court rejected Holtz's contention that SLUSA did not apply because she never alleged "a misrepresentation or omission of a material fact." 15 U.S.C. §78bb(f)(1). "Plaintiffs have alleged," the court explained "that Defendants publicly represented that they were acting in their clients' best interests, when, in fact, Defendants were acting in their own self-interest to the detriment of their clients." Pet. App. 22a (citing Am. Compl. ¶¶23, 24, 26, 37). Indeed, the court noted, the complaint "is replete with allegations that Defendants misrepresented its services for its own financial gain." Pet. App. 23a. Hence, the court concluded that although "Plaintiffs … strenuously object[ed] to the characterization of their claims as fraud," Pet. App. 19a, "the substance of Plaintiffs' allegations … [is] a claim of a fraudulent scheme by Defendants to sell Defendants' own proprietary mutual funds at the expense of their financial advisory clients," Pet. App. 23a. "Consequently, despite Plaintiffs' artful pleading, the Amended Complaint presents a claim for fraud." *Id.*

2. The court of appeals unanimously affirmed. Pet. App. 1a-13a. Writing for the court, Judge Easterbrook explained that Holtz's claims "depend on the nondisclosure of material facts," Pet. App. 2a, including that JPMorgan allegedly "concealed the incentives it gave its employees," Pet. App. 3a. "This means that nondisclosure is a linchpin of this suit no matter how Holtz chose to frame the pleadings." Pet. App. 3a. Given that, and given that covered securities were indisputably involved, the court held that the action fell

squarely within SLUSA's ban on class actions that assert "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).

The court of appeals rejected Holtz's assertion that her claims were not precluded because their elements do not include falsehoods or omissions. Pet. App. 3a-5a. It recognized that SLUSA would not preclude genuine contract claims that did not depend on falsehoods or omissions. Pet. App. 5a. But Holtz's claims, the court explained, were not genuinely ones for contract; she did not, for example, "point to any explicit term that [JPMorgan] violated." Pet. App. 6a. She was simply trying to "recharacterize as a state-law contract claim a situation that securities law sees as a nondisclosure claim." *Id.* That was impermissible, the court explained; under SLUSA, "[p]rivate class-action litigation about securities transactions must be conducted under federal securities law, so that limits adopted by Congress, or recognized by the Supreme Court, can be applied." Pet. App. 4a.

This holding, the court noted, did not prevent redress for what Holtz alleged. SLUSA, for example, permits her to litigate her state-law claims for herself and up to 49 other investors. Pet. App. 12a. It also allows state governments to litigate state-law claims, and permits the SEC to bring its own enforcement actions. Pet. App. 12a-13a. "Thus there are plenty of ways to bring [genuine] wrongdoers to account—but a class action that springs from lies or material omissions in connection with federally regulated securities is not among them." Pet. App. 13a.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Holtz argues (Pet. 9-23) that the decision below deepens a circuit conflict over when SLUSA's "misrepresentation or omission" prerequisite for preclusion is satisfied, and that this is an "ideal opportunity" to resolve "the split" (Pet. 24). That is not correct.

Contrary to Holtz's portrayal, the courts of appeals agree (and indeed often cite one another's decisions) that SLUSA bars a state-law claim when a defendant's alleged misrepresentation or omission regarding a covered security is "essential" to or the "gravamen" of the claim. The decision below is consistent with that view (differing only in using the synonym "linchpin"), and hence Holtz's claims would be barred in any of the other circuits, just as they were here. Holtz attempts to manufacture a basis for review by pointing to actual or possible lower-court disagreement about circumstances that are not present here, including when a complaint alleges misrepresentations or omissions only as extraneous background material, or when the alleged misrepresentations or omissions were committed by a third party rather than the defendant. Because those circumstances are absent here, any actual or possible lower-court disagreement regarding them—disagreement on which the Seventh Circuit has not taken a position—provides no basis for certiorari. Ultimately, Holtz's arguments boil down to a disagreement with the Seventh Circuit's conclusion that the alleged misrepresentations or omissions in her complaint are a "linchpin" of her claims. That factbound disagreement does not warrant review.

A. The Circuits Agree That SLUSA Bars State-Law Claims If False Conduct That Is Covered By SLUSA Is Essential To Them

Holtz contends (Pet. 10-16) that the Second, Third, and Ninth Circuits follow a different approach than the Sixth Circuit on when SLUSA bars a state-law claim. To the contrary, the very decisions that Holtz says are in conflict expressly recognize that—save in circumstances that are not present here—the circuits are in agreement on the issue.

For example, in discussing the preclusion standard under SLUSA, the Ninth Circuit in *Freeman Investments, L.P.* v. *Pacific Life Insurance Co.*, 704 F.3d 1110 (9th Cir. 2013), approvingly cited a Sixth Circuit decision, *Segal* v. *Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009). *Freeman* explained that SLUSA "bars class actions brought under state law, whether styled in tort, contract or breach of fiduciary duty, that in essence claim misrepresentation or omission in connection with certain securities transactions." 704 F.3d at 1114 (citing *Segal*, 581 F.3d at 310). *Freeman* again cited *Segal* (and a Third Circuit case) in later expanding on the point:

> *As our sister circuits have recognized*, the statute operates wherever deceptive statements or conduct form the gravamen or essence of the claim. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 299-300 (3rd Cir. 2005). Because we look to the substance of the allegations, plaintiffs cannot avoid preclusion "through artful pleading that removes the covered words … but leaves in the covered concepts."

Id. at 1115 (emphasis added) (quoting *Segal*, 581 F.3d at 311).

The Second Circuit has likewise made clear that it is aligned rather than in conflict with the Sixth Circuit regarding the SLUSA-preclusion standard. As Holtz points out (Pet. 10-11), the Second Circuit held in *In re Kingate Management Ltd. Litigation*, 784 F.3d 128 (2d Cir. 2015), that SLUSA precludes a state-law claim when "the success of [the] … claim *depends on* a showing that the defendant committed false conduct conforming to SLUSA's specifications," *id.* at 149 (emphasis added). Far from being a departure from Sixth Circuit law, this standard, the court explained in the next sentence, was the same one "our court stated in [a prior case] and the Sixth Circuit similarly made clear in *Segal*." *Id. Kingate* also approvingly cited both of the Sixth Circuit decisions that Holtz contends conflict with Second Circuit law (Pet. 14-15) in stating that "plaintiffs should not be permitted to escape SLUSA by artfully characterizing a claim as dependent on a theory other than falsity when falsity nonetheless is essential to the claim, such as by characterizing a claim of falsity as a breach of the contractual duty of fair dealing." 784 F.3d at 140 (citing *Segal*, 581 F.3d at 311, and *Atkinson* v. *Morgan Asset Management, Inc.*, 658 F.3d 549, 555 (6th Cir. 2011)).

Nor is there any conflict between Third Circuit and Sixth Circuit law. As Holtz states (Pet. 12), the Third Circuit held in *Rowinski* that the misrepresentation prerequisite for SLUSA preclusion is satisfied where "allegations of a material misrepresentation serve as the factual predicate of a state law claim," even if the misrepresentation "is not an essential legal element" of the claim, 398 F.3d at 300. Holtz claims that this conflicts with Sixth Circuit law. But in the case she cites to show that supposed conflict (*Segal*), the court expressly agreed with *Rowinski*, saying "[i]n *Rowinski*, 398 F.3d at 300, the court held that whether an alleged misrepresentation is 'an essential legal element' is 'immaterial under [SLUSA].' We agree—with *Rowinski*." *Segal*, 581 F.3d at 312 (alteration in original). Although *Segal* also stated that a later Third Circuit case, *LaSala* v. *Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), included dicta that was contrary to *Rowinski*, the Seventh Circuit explained in *Brown* v. *Calamos*, 664 F.3d 123 (7th Cir. 2011), that *Rowinski* and *LaSala* are actually in accord, *see id.* at 127. Holtz herself agrees, stating that "[t]he Third Circuit *reiterated* th[e *Rowinski*] rule in *LaSala*." Pet. 12 (emphasis added).

In short, the Second, Third, Sixth, and Ninth Circuits all agree that SLUSA's misrepresentation requirement is satisfied if (disregarding any artful pleading) a plaintiff's state-law claim "in essence claim[s] misrepresentation or omission in connection with certain securities transactions." *Freeman*, 704 F.3d at 1114 (citing *Segal*, 581 F.3d at 310). Indeed, despite her portrayal of the Sixth Circuit as an outlier, Holtz eventually acknowledges that that court's standard—setting aside the circumstance discussed below in which a misrepresentation or omission is alleged merely as background—is the same as other courts' standard. *See* Pet. 16 (preclusion triggered under Sixth Circuit law "so long as the 'substance of the complaint's allegations' involves misrepresentations or material omissions" (quoting *Segal* 581 F.3d at 310-311)).

B. The Issues The Petition Invokes Involving Actual Or Possible Division Among Other Circuits Are Not Implicated Here

Perhaps recognizing the circuits' broad agreement regarding SLUSA preclusion, Holtz fixates on actual or possible disagreement regarding two issues that are not implicated here. But precisely because they are not implicated, these issues provide no basis for review.

1. The Sixth Circuit has read SLUSA as barring state-law claims if the complaint includes any allegations of material misrepresentations or omissions, even if the allegations are "unnecessary." *Atkinson*, 658 F.3d at 555. Under this "'literalist' approach, … the court asks simply whether the complaint can reasonably be interpreted as alleging a material misrepresentation or omission." *Goldberg* v. *Bank of Am., N.A.*, 846 F.3d 913, 918 (7th Cir. 2017) (Flaum, J., concurring).[2]

The Third Circuit, by contrast, has held that "the inclusion of … extraneous allegations does not … require that the complaint … be dismissed under SLUSA." *LaSala*, 519 F.3d at 141. If, that is, the alleged misrepresentations or omissions are included as "background details that need not have been alleged, and need not be proved," dismissal is not required. *Id.* Under this "'looser' approach, … the court asks whether proof of a material misrepresentation or omission is inessential (an 'extraneous detail' that does not require dismissal) or essential (either a necessary element of the cause of action or otherwise critical to a plaintiff's success in the case, warranting dismissal)." *Goldberg*, 846 F.3d at 918 (Flaum, J., concurring).

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[2] *Goldberg*, which was decided by a different panel of the Seventh Circuit on the same day as this case, is the subject of a separate petition for certiorari, No. 16-1541 (June 21, 2017).

Holtz argues that the Seventh Circuit has weighed in on this extraneous-background issue, claiming (Pet. 16) that in *Brown* the court "rejected the literalist approach" but "would not go as far as the Third Circuit." That is wrong; the court in *Brown* held that the plaintiff's claim triggered SLUSA preclusion no matter which standard was correct. It stated, for example, that "[t]he plaintiff in the present case must lose even under a looser approach than the Sixth Circuit's." 664 F.3d at 128. It later reiterated that conclusion, stating that because "[t]he fraud allegations may be central to the case," the claims were "barred by SLUSA under any reasonable standard." *Id.* at 130.[3]

The decision below likewise did not take a position on the extraneous-background issue—in fact, even Holtz does not suggest otherwise. The court simply held that Holtz's allegations of nondisclosure are "a linchpin of this suit no matter how Holtz chose to frame the pleadings," i.e., that "the suit *depends on* Holtz's assertion that [JPMorgan] concealed the incentives it gave its employees." Pet. App. 3a (emphasis added); *accord Goldberg*, 846 F.3d at 915 (per curiam) (plaintiff's claim "depends on the omission of a material fact"). As Judge Flaum put it in discussing the "nearly identical" fiduciary-duty claim in *Goldberg*, the claim "triggered SLUSA preemption under both the Sixth Circuit's 'literalist' approach and the Third Circuit's 'looser' approach" because the "failure to disclose was far from an inessential 'extraneous detail.' Rather, [the] claim rested on it." 846 F.3d at 918, 919 (Flaum, J., concurring).

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[3] As this discussion shows, and as elaborated below (pp.17-18), Holtz is wrong in asserting that *Brown* adopted its own, "implied omissions" standard for SLUSA preclusion.

Because the extraneous-background issue is not implicated here and the Seventh Circuit has not weighed in on it, any lower-court disagreement on that issue provides no basis for certiorari.

2. Holtz also invokes a second issue that is not implicated in this case, namely whether a prerequisite to SLUSA preclusion is that the alleged misrepresentations or omissions be made by the defendant rather than by a third party. The Second Circuit has embraced such a limitation on preclusion, first in *Romano* v. *Kazacos*, 609 F.3d 512, 519-520 (2d Cir. 2010), and then again in *Kingate*, 784 F.3d at 146. In the latter case, the court addressed a contention that its third-party holding departed from *Rowinski* and *Segal*. The Second Circuit rejected that contention, explaining that in those cases, the "proofs necessary to plaintiffs' state law claims would have shown conduct *of the defendant* falling within SLUSA's operative provisions." *Kingate*, 784 F.3d at 146. But, the court continued:

> To the extent the Third and Sixth Circuit decisions may be read to mean that SLUSA's ambiguous term 'alleging' should be deemed satisfied whenever a complaint includes allegations of false conduct (of the sort specified in SLUSA) that is essential to the success of the state law claim, *even if that false conduct is alleged to have been done by third persons without the defendant's complicity*, we respectfully disagree.

Id. (emphasis added). The next sentence in *Kingate* confirmed which issue the court was addressing in voicing this possible disagreement: "In our view, the history and the purposes of this provision all favor interpreting it to apply to state law claims predicated on conduct *by the defendant*." *Id.*[4]

Holtz acknowledges (Pet. 11 n.3) that this third-party issue "does not arise in this case" because her complaint attributes the alleged false conduct to the defendants rather than any third party. Yet she points to the Second Circuit's expression of possible disagreement as a basis for certiorari here—by claiming (Pet. 11) that the disagreement bears on the actual issue in this case rather than the third-party issue. As just shown, that is manifestly incorrect.

Indeed, the fact that *Kingate* voiced potential disagreement with both "the Third and Sixth Circuit[s]," confirms that any disagreement does not bear on the issue in this case. Holtz herself, after all, repeatedly states (correctly) that on the actual issue here, the Second Circuit is aligned with the Third Circuit. *E.g.*, Pet. 10 (section header: "The Majority Approach of the Second, Third, and Ninth Circuits"). Yet she attempts to use *Kingate*'s statement of possible disagreement *with the Third Circuit* to claim that a conflict exists on the issue in this case. It does not.[5]

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[4] When quoting this sentence, Holtz (Pet. 11) omits the court's emphasis of "by the defendant," evidently to downplay the fact that the court was talking about the third-party issue.

[5] Holtz tries to elide this contradiction not only by omitting the Second Circuit's emphasis on it, *see supra* n.4, but also by referring generically to "other courts" when quoting *Kingate*'s statement of possible disagreement. *See* Pet. 11 ("To the extent *other courts* might have adopted the first interpretation, the Second Circuit explained, 'we respectfully disagree.'" (emphasis added)). As shown in the block quote above, *Kingate* did not refer to "other courts," instead naming the circuits—including the Third Circuit—with which it disagreed.

3. Holtz injects the extraneous-background and third-party issues into her petition because doing so allows her to quote (e.g., Pet. 2, 22) various courts and treatises discussing actual or possible disagreement on those issues (particularly the former). In fact, with the exception of Judge Hamilton's dissent in *Goldberg*, *every one* of the quotes Holtz offers regarding lower-court division pertains to one of those issues. But as explained, both issues simply are not implicated here. Given this, and given that—as explained—there is no circuit conflict on the actual issue in this case, certiorari is not warranted.

C. The Decision Below Is Consistent With Other Circuits' Precedent

1. The Seventh Circuit held here that "[u]nder SLUSA, securities claims that depend on the nondisclosure of material facts must proceed under the federal securities laws exclusively," Pet. App. 2a. In other words, SLUSA bars a state-law claim where "nondisclosure is a linchpin of th[e] suit" (i.e., what other circuits call the essence or gravamen). Pet. App. 3a. Applying this standard, the court concluded that dismissal of Holtz's complaint was proper because alleged false conduct (including nondisclosure) in connection with federal securities transactions is essential to her claims. *See id.* ("[T]he suit depends on Holtz's assertion that [JPMorgan] concealed the incentives it gave its employees."); *id.* ("[T]he district court concluded that these claims necessarily rest on the 'omission of a material fact.'"). Preclusion was triggered, the court continued, even though Holtz framed the claims as state-law causes of action that lack false conduct as an element. *Id.*; *accord Rowinski*, 398 F.3d at 300 ("approach[] under which only essential legal elements of a

state law claim trigger preemption[] is inconsistent with the plain meaning of the statute").

This holding and reasoning are in harmony with the decisions of the circuits discussed in Part I.A. As explained, those courts' standard is that a state-law claim is precluded if it "depends on" false conduct or if false conduct is the "essence" or "gravamen" of the claim. *See Kingate*, 784 F.3d at 140 (SLUSA applies when "falsity … is essential to the claim"); *id.* at 149 (SLUSA applies when "the success of a class action claim depends on a showing that the defendant committed false conduct"); Pet. App. 2a ("depend[s] on"); *Goldberg*, 846 F.3d at 915 (per curiam) (same); *Freeman*, 704 F.3d at 1114 (SLUSA bars a state-law claim "wherever deceptive statements or conduct form the gravamen or essence of the claim" (citing *Rowinski*, 398 F.3d at 299-300)); *Segal*, 581 F.3d at 311 (preclusion is triggered where the misrepresentation or omission is the "gravamen" of the complaint).

The circuits also all determine in the same way whether false conduct is essential to a claim, by asking whether the alleged misrepresentations or omissions fall within the scope of the federal securities laws. The Second Circuit, for example, looks at whether the alleged false conduct "would violate the anti-falsity provisions" of federal securities law. *Kingate*, 784 F.3d at 150. The Ninth Circuit does likewise, examining whether alleged conduct "adds up to a violation of the securities law." *Freeman*, 704 F.3d at 1116. So do the Sixth Circuit, which asks whether alleged conduct includes "covered concepts" in SLUSA, *Segal*, 581 F.3d at 311; the Third Circuit, *see Rowinski*, 398 F.3d at 300 (asking whether alleged conduct constitutes "SLUSA prerequisites … in one form or another"); and the Seventh Circuit, *see* Pet. App. 7a (Holtz's claims are "a staple of federal securities law"). There is simply no circuit conflict on the actual issue in this case.

2. Seeking to manufacture such a conflict, Holtz contends (Pet. 16-22) that the Seventh Circuit has adopted a unique standard that she labels the "implied omission" approach, a phrase drawn from language in *Brown*, *see* 664 F.3d at 127. But Holtz notably cites no authority endorsing that reading of *Brown*, i.e., no authority suggesting that *Brown* adopted an "implied omission" standard. In fact, save for Judge Hamilton's dissent—which did not characterize *Brown* as adopting an "implied omission" standard—Holtz cites no authority suggesting that *Brown* was departure of any kind from other circuits. That is not surprising: Holtz's argument rests on a severe distortion of *Brown*.

Holtz's characterization of *Brown* rests on the court's observation that in the plaintiff's complaint in that case, "[a] misleading omission is … alleged, at least implicitly." 664 F.3d at 127. But that was not the end of the court's analysis, as Holtz suggests. To the contrary, the court (after rhetorically asking, "Should we stop here and affirm …?," *id.*) spent another *2,000-plus* words explaining why dismissal was warranted both under the Sixth Circuit's literalist approach as well as "under a looser approach than the Sixth Circuit's," i.e., "one close to the Third Circuit's[]," *id.* at 128. And as noted earlier, the court, far from embracing an "implied omissions" standard, concluded that the claim failed under "any reasonable standard." *Id.* at 130.

If anything, *Brown*—in which this Court denied a similar petition for certiorari, *see* 567 U.S. 916 (2012)—expressly rejected an "implied omissions" theory. In discussing the literalist approach, the court stated that one "concern" with that approach was "that it could lead to inconclusive haggling over whether an *implication* of fraud could be extracted from allegations in the complaint that did not charge fraud directly." 664 F.3d at 128 (emphasis added). The court explained, in other words, why a standard based on implied omissions was flawed. Holtz's claim about an "implied omissions" standard is utterly unmoored from *Brown*. And even Holtz cannot assert that any such standard was even mentioned, let alone applied, here or in *Goldberg*. The standard simply does not exist.

3. In the end, Holtz's request for certiorari rests on Judge Hamilton's claim in *Goldberg* of a three- or four-way circuit conflict. That claim does not provide a basis for review, for three reasons. First, as explained, all circuits (including the Sixth and Seventh) agree that SLUSA preclusion is triggered when, as here, a state-law claim depends on a defendant's alleged misrepresentation or omission about a covered security (or, in other words, when such a misrepresentation or omission is essential to, or the gravamen or linchpin of, the claim). Second, as also explained, any disagreement among other circuits regarding the extraneous-background scenario is not implicated here. And third, Judge Hamilton attributes to his own court holdings that it did not adopt. In *Brown*, *Goldberg*, and here, the court held only that a misrepresentation or omission was essential to the claims. *See Brown*, 664 F.3d at 130, *quoted supra* p.12; *Goldberg*, 846 F.3d at 915 (per curiam), *quoted supra* p.12; Pet. App. 3a, *quoted supra* p.12. Those holdings do not depart from other circuits—none of the three decisions said otherwise—or portend the far-reaching implications Judge Hamilton suggests. While this Court can of course revisit the need to take up a case if future Seventh Circuit decisions do embrace those implications, there is no need to do so here.

Holtz suggests, however (Pet. 9), that the Court cannot wait, that it will not have many future opportunities because when "a district court concludes SLUSA is no bar," i.e., when the claims are *not* precluded, "it will often remand the case to state court, a decision that cannot be appealed." Putting aside the implausibility of Holtz being concerned about a scenario in which SLUSA preemption is regularly denied, this plea for urgency fails. Preclusion was found, and hence review by this Court was available, in most of the circuit and district court cases from the last decade that Holtz herself cites—cases that belie the similar prediction about a dearth of opportunities that Holtz's counsel made in seeking certiorari in *Brown*, *see* Pet. 19-20, *Brown*, No. 11-1173, 2012 U.S. S. Ct. Briefs LEXIS 1199 (Mar. 23, 2012). Moreover, if the Seventh Circuit has in fact adopted a rule nearly as sweeping as Holtz claims—"effectively preclud[ing] all relief for investors injured by breaches of contract or fiduciary obligations unaccompanied by bad faith or scienter" (Pet. 24)—there will surely be additional decisions amenable to this Court's review.

D. Holtz's Claims Would Be Barred In Every Circuit

Further evidence of the absence of a circuit conflict—and the absence of any need for review in this case—is the fact that Holtz's claims would be barred by SLUSA in each of the circuits she cites. Decisions from those circuits (many of them factually similar to this one) make that clear.

In *Rowinski*, for example, the Third Circuit held that SLUSA barred claims much like Holtz's, claims by a bank's brokerage clients that the bank's investment advice to them was secretly biased in favor of the bank's investment-banking clients—even though the claims (like Holtz's) did not include a misrepresentation or omission as an element. 398 F.3d at 299-300. Although Holtz posits a conflict (Pet. 21-22) between the decision below and the Third Circuit's later decision in *LaSala*, the lack of preclusion in *LaSala* turned on the third-party issue (although the court did not frame it that way): The plaintiff's claim was that banks had failed "properly to investigate and freeze" fraudulent transactions by the corporation's directors. 519 F.3d at 141. The Third Circuit found no preclusion because "[t]he Directors' … alleged misrepresentations" had "no bearing on whether the Banks' [separate] conduct"—which was not alleged to involve misrepresentations—was actionable. *Id.* As discussed, this case concededly does not involve the third-party issue; Holtz seeks redress for allegedly fraudulent nondisclosures by JPMorgan itself.

Holtz's claims are likewise similar to those in *Segal*. The Sixth Circuit concluded there that SLUSA barred contract and fiduciary-duty claims that a bank "failed to inform trust beneficiaries that their trust accounts would be invested in proprietary mutual funds" that charged higher fees than superior funds operated by the bank's competitors. 581 F.3d at 309-310. The court held the claims precluded even though the beneficiaries (like Holtz here) "expressly disclaimed" reliance on any misrepresentation or failure to disclose. *Id.* at 310; *see* Pet. App. 27a (paragraph 1 of the operative complaint: "Plaintiffs do not allege fraud, deceptive practices, misrepresentation, or material omission[.]").

Holtz's fiduciary-duty claim is also akin to the one in *Proctor* v. *Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009). The plaintiffs there alleged that the defendants' incomplete and misleading statements induced the plaintiffs to sell their securities at a disadvantageous rate. *Id.* at 1222. Holtz likewise alleges that incomplete and misleading statements induced her to invest disadvantageously in JPMorgan affiliates' funds rather than in superior unaffiliated funds. She does not, by contrast, present "a straightforward contract claim that doesn't rest on misrepresentation or fraudulent omissions," as in the Ninth Circuit's decision in *Freeman*. 704 F.3d at 1118. In fact, despite bringing a breach-of-contract claim, *Holtz* "does not point to any explicit term that [JPMorgan] violated." Pet. App. 6a. For that reason, Holtz's assertion of a conflict between *Freeman* and the decision below (Pet. 21) is meritless.

Finally, Holtz's claim would also be precluded in the Second Circuit. That court held in *Romano* that contract and fiduciary-duty claims are barred under SLUSA when plaintiffs, "in essence, assert that defendants fraudulently induced them to invest in securities." 609 F.3d at 519-520. That is what Holtz asserts: that JPMorgan "gives its employees incentives to place clients' money in [its] own mutual funds," but "concealed the incentives," i.e., never "told customers that its investment advisors were compensated more for selling the [JPMorgan's] mutual funds than for selling third-party funds." Pet App. 2a, 3a; *see also* Pet. App. 7a-8a.

Despite all this, Holtz denies (Pet. 19-21) that her claims would be dismissed in other circuits. But that denial rests partly on factbound disagreement with the Seventh Circuit's application of the legal standard, and partly on mischaracterizing the decision below. As to the former, Holtz simply disputes the reading of her complaint that led the Seventh Circuit to conclude that "nondisclosure is a linchpin of this suit." Pet. App. 3a; *compare* Pet. 20 ("[T]he Complaint contains no allegation of a misrepresentation that was material or essential."). That case-specific disagreement does not warrant certiorari. As to the latter, Holtz wrongly states (Pet. 20) that the court of appeals "found an omission in this case only by … considering hypothetical defenses a defendant might raise." In reality, the court explained that nondisclosure was an essential predicate to Holtz's affirmative claims for redress. She could not, that is, prevail simply by demonstrating that JPMorgan steered plaintiffs' money toward its affiliates' fund even if that was sub-optimal for clients; she would have to prove that it did so without telling clients, or after telling them that it would act in their best interest. Pet. App. 3a. Holtz obviously recognizes this, which is why her complaint discusses at some length JPMorgan's alleged statements that are purportedly inconsistent with JPMorgan's alleged conduct toward the plaintiffs. That is what makes nondisclosure the linchpin (or essence or gravamen) of Holtz's claims. And it is why her claims would have been dismissed in any of the circuits she cites.

II. HOLTZ OVERSTATES THE IMPORTANCE OF THE QUESTION PRESENTED

Holtz's contention (Pet. 23-25) that her question presented is critically important depends on attributing to the decision below implications that it simply does not have. Among other things, the decision neither affects state-law contract and fiduciary-duty claims that allege conduct beyond what is covered by federal securities law, nor leaves investors unprotected from conduct covered by federal securities law. There is no pressing need for this Court's intervention.

A. The Seventh Circuit's Decision Affects State-Law Claims Only If They Are Within The Scope Of Federal Securities Law

Holtz argues (Pet. 24) that the Seventh Circuit's decision "effectively precludes all relief for investors injured by breaches of contract or fiduciary obligations unaccompanied by bad faith or scienter." That sweeping claim is assuredly wrong. SLUSA precludes only claims alleging a material misstatement or omission under the federal securities law, i.e., "in connection with the purchase or sale of a covered security." 15 U.S.C. §78bb(f)(1).

The Seventh Circuit recognized this limitation here, stating that SLUSA does not preclude state-law claims alleging conduct that is "outside the scope of federal securities law." Pet. App. 10a. It also recognized the limitation in *Goldberg*, stating that SLUSA applies when a "claim could be pursued under federal securities law." 846 F.3d at 916 (per curiam). Indeed, the court recognized that SLUSA "often permits genuine contract claims to survive preemption." Pet. App. 5a; *see also* Pet. App. 8a. But SLUSA does not allow a securities-fraud claim so transparently masquerading as a contract claim that the plaintiff never—even in her petition for certiorari, despite being called out for the failing by the court of appeals—identifies the specific contractual provision that was supposedly breached.[6]

This Court has already rejected arguments like Holtz's that predict the transformation of every contract or fiduciary-duty claim into a federal securities claim (which would then potentially be subject to

[6] Any attempt by Holtz to specify such a provision in her reply should be regarded with the skepticism normally accorded to arguments first offered in reply briefs.

SLUSA preclusion). In *SEC* v. *Zandford*, 535 U.S. 813 (2002), the Court unanimously rebuffed the notion that its ruling would "transform every breach of fiduciary duty into a federal securities violation," *id.* at 825 n.4. As the Court explained, "[i]f, for example, a broker embezzles cash from a client's account or takes advantage of the fiduciary relationship to induce his client into a fraudulent real estate transaction, then the fraud would not include the requisite connection to a purchase or sale of securities." *Id.* This response applies with equal force here. The decision below respects the preclusion boundaries that Congress laid out in SLUSA.

Holtz relatedly contends (Pet. 29-30) that holding her contract and fiduciary-duty claims precluded would intrude too much into states' role in enforcing common-law obligations. This Court rejected similar arguments in *Dabit*, explaining that "Congress did not … act 'cavalierly' here," but rather acted consistently with the fact that "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." 547 U.S. at 87-88. Hence, the Court continued, "[t]his is hardly a situation … in which a federal statute has eliminated a historically entrenched state-law remedy." *Id.* at 88. Rather, SLUSA sought to further "the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities,'" by precluding "parallel class actions" under state and federal law, "with different standards governing claims asserted on identical facts." *Id.* at 86-87 (quoting SLUSA §2(5), 112 Stat. at 3227). *Dabit* also explained that "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the … class-action device to vindicate certain claims." 547 U.S. at 87. This further refutes both Holtz's federalism argument and her assertion that review is urgently needed.

B. The Seventh Circuit's Decision Does Not Leave Investors Unprotected

Holtz next argues (Pet. 24-25) that review is urgently needed because the Seventh Circuit's decision exposes investors to securities misconduct. That argument also lacks merit.

As explained, SLUSA applies only where federal securities law covers any precluded allegations. In those circumstances, there usually will be a federal private right of action. In fact, the court below cited examples of private federal securities claims raising the same alleged conduct that Holtz alleges here. Pet. App. 7a-9a. What really concerns Holtz and others, of course, is that such actions would be subject to the limitations of the PSLRA. But that is the choice Congress made, and it should not be circumvented.

Nor does SLUSA even prevent all use of state law to vindicate conduct covered by the federal securities law. SLUSA "is limited to 'covered class actions,' which means that Holtz could litigate for herself and as many as 49 other customers." Pet. App. 12a (citing 15 U.S.C. §78bb(f)(5)(B)(i)(I)). This Court made the same point in *Dabit*, explaining that "[t]he Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." 547 U.S. at 87.

Finally, the SEC can bring an enforcement action (as in fact occurred here, ending with a settlement), and states can bring claims without facing SLUSA preclusion. *See* Pet. App. 12a-13a (citing 15 U.S.C. §78bb(f)(3)(B)). These myriad avenues of redress ensure that genuine wrongdoers can be held to account. Holtz's claim that the decision below leaves investors unprotected is therefore baseless.[7]

III. THE DECISION BELOW IS CORRECT

Holtz contends (Pet. 26-30) that the Seventh Circuit misapplied SLUSA here. That is wrong. The court faithfully followed this Court's securities-law precedents in concluding, correctly, that SLUSA bars Holtz's claims. That factbound conclusion does not warrant this Court's review.

A. The Seventh Circuit Followed This Court's Precedents

As the court of appeals explained, its decision is consistent with both *Dabit* and *Wharf (Holdings) Ltd.* v. *United International Holdings, Inc.*, 532 U.S. 588 (2001). Pet. App. 6a-8a. Holtz does not contend otherwise, or assert a conflict with any other decision of this Court.

The Court held in *Dabit* that SLUSA precluded contract and fiduciary-duty claims that, like Holtz's, were based on allegedly broken contractual promises connected to securities trades. *See* 547 U.S. at 75; Pet. App. 6a-7a. The Court explained that the "misconduct of which [plaintiff] complains here—fraudulent manipulation of stock prices—unquestionably qualifies as fraud … under federal securities law." *Dabit*, 547 U.S. at 89.

[7] Holtz also argues (Pet. 9) that "the circuit conflict" will produce forum shopping. *See also* Pet. 23. Holtz's counsel made the same prediction in seeking certiorari in *Brown*. *See Brown* Pet. 17. Yet five years later, Holtz offers no evidence that forum shopping is widespread, or even has occurred at all—perhaps because, as explained, "the circuit conflict" she posits does not exist. Her prediction warrants no weight.

The Seventh Circuit's holding that SLUSA bars Holtz's claims because the misconduct she alleges would, if true, similarly qualify as securities fraud follows from *Dabit*.

It also follows from *Wharf*. There this Court held that it constitutes securities fraud to enter into a contract connected to securities trading with the intent not to honor it. *See* Pet. App. 7a-8a (discussing *Wharf*). This Court rejected the contention that allegations a party entered into a securities contract "while secretly intending from the very beginning not to honor" were "no more than ordinary state breach-of-contract claims"; they were instead, the Court held, "federal securities claims." *Wharf*, 532 U.S. at 596-597. The Seventh Circuit's ruling that Holtz's claims similarly involve conduct covered by federal securities law—and are not just ordinary state-law contract claims—is consistent with that holding.

B. The Court Of Appeals Correctly Held That Holtz's Allegations Fall Within The Scope Of SLUSA Preclusion

Holtz's contention that the Seventh Circuit incorrectly applied SLUSA to her claims seeks factbound error correction and in any event is meritless.

As Holtz acknowledges (Pet. 28), SLUSA precludes claims "premised on the functional equivalent of the essential elements of a federal securities action." She simply disagrees with the Seventh Circuit's case-specific conclusion that her claims meet that standard. That does not warrant certiorari.

Reprising her argument that her claims would not be barred in other circuits, Holtz also suggests (Pet. 26-28) that the Seventh Circuit's decision was based not on her actual claims but on two hypotheticals: a "disclosure defense" that JPMorgan could raise and securities-fraud claims that Holtz could have brought. That is not correct.

Holtz's claim that the decision below turned on what defenses JPMorgan could raise is wrong for the reasons given above, *see* pp.22-23. Her claim that it turned on whether she could have brought federal securities-fraud claims fares no better. In the passages Holtz cites (Pet. 28 (citing Pet. App. 4a-5a, 7a, 10a)), the Seventh Circuit explained that Holtz's allegations of misrepresentations and omissions triggered SLUSA preclusion because they fell within the scope of the federal securities law, and because plaintiffs cannot take their claims outside that scope with artful pleading. If Holtz means to take issue with either point, she is running directly into this Court's precedent—which the Seventh Circuit relied on in each passage Holtz cites. *See* Pet. App. 4a-5a (citing *Dabit*), 7a (citing *Wharf*), 10a (citing *Dabit*). In *Dabit*, for example, this Court explained that basing the scope of SLUSA preclusion on the scope of the federal securities laws makes sense given that Congress drew from section 10(b) and rule 10b-5 in enacting SLUSA. In particular, Congress "imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision." 547 U.S. at 85. Holtz misses the point in responding (Pet. 28) 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." The Seventh Circuit had already concluded that Holtz alleges a material misrepresentation or omission. *See* Pet. App. 3a. The court was instead explaining why those allegations triggered SLUSA, namely because they fell within the scope of the securities laws and artful pleading cannot change that. Again, both points are correct and consistent with this Court's precedent.

Indeed, if there were any doubt that the Seventh Circuit correctly held that misrepresentations or omissions were the linchpin of Holtz's claims, that doubt would be dispelled by a related case that her counsel below filed against JPMorgan in New York state court, *Tralins* v. *JPMorgan Chase & Co.*, No. 12-CIV-5970 (N.Y. Sup. Ct. July 13, 2012). The complaint in *Tralins* is based on the same alleged conduct as here, but it explicitly characterizes that conduct as fraudulent and misleading. For example, plaintiffs there alleged that JPMorgan, "acting fraudulently, with bad faith, gross negligence, for self-interested reasons, or without due care, breached its fiduciary duties" and "engaged in materially misleading, unfair, and deceptive acts," "including omissions, … designed to mislead reasonable consumers." Compl. ¶¶69, 73, 75. Plaintiffs also alleged that "[h]ad JPMorgan not made the fraudulent statements and omissions to Plaintiff and the other members of the Class, Plaintiff and the other members of the Class would not have purchased JPMorgan's proprietary funds and investments." *Id.* ¶95. Holtz's artful pleading, removing the explicit use of the words "fraud" and "omissions" made in that other case, does not suffice to escape SLUSA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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