No. 16-1541

In the Supreme Court of the United States

MARGARET RICHEK GOLDBERG, PETITIONER

v.

BANK OF AMERICA, N.A., ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Securities Litigation Uniform Standards Act precludes a class action asserting claims that depend on misrepresentations or omissions made in connection with the sale or purchase of a covered security.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Margaret Richek Goldberg; respondents are Bank of America, N.A., and LaSalle Bank, N.A. Bank of America, N.A., is an indirect subsidiary of Bank of America Corporation; Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock. LaSalle Bank, N.A., was merged into Bank of America, N.A.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-34a) is reported at 846 F.3d 913. The opinion and order of the district court (Pet. App. 35a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2017. A petition for rehearing was denied on February 21, 2017 (Pet. App. 1a-2a). On May 11, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 21, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a class action brought on behalf of certain account holders with respondent LaSalle Bank, challenging a practice whereby LaSalle would invest (or "sweep") any excess cash balance into a mutual fund chosen by the account holder. The fund would then invest the transferred balance. Some mutual funds allegedly paid LaSalle fees based on the transferred balances, which LaSalle kept without disclosing to account holders that it was doing so. After respondent Bank of America acquired LaSalle, it notified account holders that the fees were being eliminated.

Petitioner is the successor trustee for a trust that held an account with LaSalle. Petitioner's predecessor brought a class action in Illinois state court, asserting that LaSalle had failed to disclose its alleged practice of retaining those fees and bringing state-law claims for breach of contract, breach of fiduciary duty, and unjust enrichment.

After removing the action, respondents moved to dismiss. As is relevant here, they argued that petitioner's claims were precluded under the Securities Litigation Uniform Standards Act (SLUSA), which provides that any "covered class action based upon the statutory or common law of any State or subdivision thereof" that alleges, *inter alia*, "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" should be dismissed. 15 U.S.C. 78bb(f)(1). While petitioner conceded that the suit was a "covered class action based upon [state] law" and that it involved "covered securities," she contended that her claims did not sufficiently involve a misrepresentation or omission of a material fact in connection with the purchase or sale of securities.

The district court granted respondents' motion to dismiss, reasoning that "the essence of [the] amended complaint" was that LaSalle had "made misrepresentations and omitted material facts regarding conflicts of interest and fees *relating to* the transfer of trust assets into mutual funds." Pet. App. 47a. The court of appeals affirmed, concluding that each of petitioner's claims "depends on the omission of a material fact—that some mutual funds paid, and [LaSalle] kept, fees extracted from the 'swept' balances." *Id.* at 5a.

Petitioner now seeks this Court's review, based principally on the claim that the standard for dismissal under SLUSA applied by the court of appeals in the decision below conflicts with the standard applied in the Second, Third, and Ninth Circuits. But any purported conflict in the standard is not implicated here. As Judge Flaum explained in detail in his concurring opinion (which petitioner does not so much as mention), petitioner's claims would also have been dismissed under the standard applied in the cited circuits. More broadly, there is little meaningful difference between the standards articulated by the courts of appeals. And the court of appeals' decision in this case is correct and consistent with the text of SLUSA. The petition for a writ of certiorari should therefore be denied.

1. In 1998, Congress enacted SLUSA to ensure that class actions involving nationally traded securities would be adjudicated under the standards created by federal law, particularly certain pleading requirements that Congress had created through its earlier passage of the Private Securities Litigation Reform Act. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81-82 (2006). To that end, SLUSA applies only to "covered class actions," which are principally defined as actions in which claims are asserted on behalf of a class of

unnamed claimants on the basis that common issues will predominate. 15 U.S.C. 78bb(f)(5)(B). Such actions must also involve a "covered security," largely as defined in the Securities Act of 1933. 15 U.S.C. 78bb(f)(5)(E) (referring to 15 U.S.C. 77r(b)).

With those two defined terms, SLUSA's core provision closely tracks the language of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. That is, SLUSA applies to any "covered class action * * * alleging * * * a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," which closely approximates the language of Rule 10b-5(b). 15 U.S.C. 78bb(f)(1)(A); see 17 C.F.R. 240.10b-5(b). SLUSA also applies to any "covered class action * * * alleging * * * that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security," which tracks the principal language of Section 10(b). 15 U.S.C. 78bb(f)(1)(B); see 15 U.S.C. 78j(b).

As to such covered class actions, subject to exceptions not relevant here, SLUSA provides that they can be removed to federal court and cannot proceed under state law. See 15 U.S.C. 78bb(f)(1)-(3). State-law claims in a covered class action should therefore be dismissed.

2. Petitioner's predecessor originally brought this class action in Illinois state court, asserting state-law claims for breach of contract, breach of fiduciary duty, unjust enrichment, and an accounting. Pet. 6; Pet. App. 4a. The crux of the allegations was that LaSalle provided account holders, such as petitioner's trust, with a list of mutual funds in which excess cash could be invested; an account holder would then select a fund into which any excess cash in its account would be swept. Pet. App. 47a. According to the complaint, LaSalle "failed to disclose

that they were receiving daily cash reinvestment (sweep) fees" from certain of those funds, which allegedly constituted a breach of LaSalle's duty of candor. *Id.* at 14a. The complaint further alleged that, because LaSalle retained the fees "without authorization [from], or disclosure to, * * * account holders," *id.* at 16a, LaSalle breached its contracts with the account holders. The original complaint went so far as to allege that LaSalle affirmatively "*steered* plaintiff and members of the [c]lass to investment vehicles that had agreed to pay a percentage fee" to LaSalle based on the amounts deposited in those funds. *Id.* at 13a.

3. Respondents removed the action to the United States District Court for the Northern District of Illinois under SLUSA's removal provision. Pet. App. 36a; see 15 U.S.C. 78bb(f)(2). Respondents then moved to dismiss on the ground, *inter alia*, that SLUSA precluded the state-law claims. Pet. App. 36a & n.2.

The district court granted respondents' motion to dismiss. Pet. App. 35a-49a. The court determined that "the essence" of the complaint was a claim of misrepresentations and omissions by LaSalle regarding its undisclosed retention of fees. *Id.* at 47a. Specifically, the claim was that "LaSalle never disclosed or reported [its] fees to [account holders] either on a fee schedule provided in advance of a securities transaction or an account statement issued after a securities transaction," despite LaSalle's "legal duty" to do so. *Id.* at 47a-48a. Nor was there any question about the materiality of the alleged misrepresentations and omissions, because the complaint had affirmatively alleged that "the undisclosed fees were material to [the plaintiff's] decision to maintain a custodian account with [LaSalle] and continue to have [LaSalle] reinvest daily cash balances in these mutual fund shares." *Id.* at 48a.

4. The court of appeals affirmed. Pet. App. 3a-34a.[1]

a. In a *per curiam* opinion, the court of appeals agreed with the district court that SLUSA precluded petitioner's state-law claims. Pet. App. 4a-8a. Because each of petitioner's claims "depends on the omission of a material fact—that some mutual funds paid, and [LaSalle] kept, fees extracted from the 'swept' balances," the court of appeals rejected petitioner's argument that the claims rested only on state contract and fiduciary law, not securities law. *Id.* at 5a. The court noted that "[a] claim that a fiduciary that trades in securities for a customer's account has taken secret side payments is well inside the bounds of securities law." *Id.* at 7a-8a.

The court of appeals also agreed that the alleged omission occurred "in connection with" the purchase or sale of a covered security. Pet. App. 7a. Specifically, the court reasoned that account holders were "dealing directly with covered [securities]": namely, the mutual funds in which they were deciding whether to invest. *Id.* at 5a-6a (citing *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1068-1069 (2014)). The court rejected petitioner's contention that an omission satisfied the "in connection with" requirement only where it "involve[s] the price, quality, or suitability of [a] security." *Id.* at 6a.

b. Judge Flaum concurred. Pet. App. 9a-17a. He observed that, in *Brown* v. *Calamos*, 664 F.3d 123 (2011), cert. denied, 567 U.S. 916 (2012), the Seventh Circuit had noted the existence of divergent approaches regarding

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[1] The court of appeals issued its decision on the same day as it issued another decision interpreting SLUSA. See *Holtz* v. *JPMorgan Chase Bank, N.A.*, 846 F.3d 928 (7th Cir. 2017). A petition for a writ of certiorari is also pending in that case. See No. 16-1536 (filed June 21, 2017).

what it means to "allege[] 'a misrepresentation or omission of a material fact'" for purposes of SLUSA, with the main division existing between the Sixth Circuit's assertedly more expansive "'literalist' approach" and the Third Circuit's "'looser' approach." Pet. App. 11a-12a.[2] Judge Flaum described the Third Circuit as asking whether an alleged misrepresentation or omission is "essential (either a necessary element of the cause of action or otherwise critical to a plaintiff's success in the case, warranting dismissal)." *Id.* at 12a; see Pet. 14 (characterizing the Third Circuit's standard in the same manner).

Under that standard—which petitioner concedes is the "same approach" as that taken in the other courts of appeals that make up her asserted circuit conflict, Pet. 14—Judge Flaum determined that petitioner's complaint would have been dismissed, because her claims "rested on" or were "fundamentally tied to" the alleged misrepresentations or omissions. Pet. App. 14a, 16a-17a. Judge Flaum added the result would be the same under the Sixth Circuit's so-called "'literalist' approach," which "asks simply whether the complaint can reasonably be interpreted as alleging a material misrepresentation." *Ibid.*

c. Judge Hamilton dissented. Pet. App. 18a-34a. He contended that the majority's standard, which he characterized as precluding a claim if "the plaintiff *could* assert a securities fraud claim," impermissibly expanded SLUSA's scope. *Id.* at 20a-21a, 28a-34a. In his view, the Seventh Circuit's decision in this case (and a companion

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[2] In *Brown*, the Seventh Circuit suggested that the Ninth Circuit followed an "intermediate" approach, which Judge Flaum also described. See Pet. App. 11a-12a. After *Brown*, however, the Ninth Circuit decided *Freeman Investments, L.P.* v. *Pacific Life Insurance Co.*, 704 F.3d 1110 (2013), in which it joined the approach taken by its "sister circuits," citing the Third Circuit's decision in *Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294 (2005). See 704 F.3d at 1115.

case, see p. 6 n.1, *supra*) deepened an existing conflict among the courts of appeals, and he urged the Seventh Circuit to adopt the standard of the Third Circuit and others. *Id.* at 18a, 22a-28a. Without directly addressing the reasoning of Judge Flaum's concurrence, he asserted that the claims were "simple" claims for breach of contract and fiduciary duty that did not rely on a misrepresentation or omission. *Id.* at 18a.

5. The court of appeals subsequently denied petitioner's petition for rehearing without recorded dissent. Pet. App. 1a-2a.

ARGUMENT

This case does not warrant the Court's review. The straightest path to a denial of certiorari is that any division among the courts of appeals is not implicated by this case. In any event, despite their use of somewhat varying formulations, the courts of appeals are not in meaningful conflict over the standard for determining whether a covered class action does in fact "alleg[e] * * * a misrepresentation or omission." 15 U.S.C. 78bb(f)(1)(A).

Moreover, the decision below is correct and faithfully applies SLUSA. Petitioner's claims here are indistinguishable from others that this Court has recognized as claims under the federal securities laws. See, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 823 (2002); *Wharf (Holdings) Ltd.* v. *United International Holdings, Inc.*, 532 U.S. 588, 596-597 (2001). SLUSA provides that, when brought in class actions, such claims may be brought only in federal court and under federal law. Because this case does not satisfy the familiar criteria for the Court's review, the petition for a writ of certiorari should be denied.

A. This Case Does Not Implicate Any Purported Circuit Conflict

Petitioner contends that the decision below conflicts with the decisions of the Second, Third, and Ninth Circuits concerning the meaning of SLUSA's requirement that only a covered class action that "alleg[es] a misrepresentation or omission of a material fact" is subject to dismissal. See Pet. 13-16. As discussed below, there is no meaningful division among the courts of appeals, and certainly not among the four courts petitioner invokes. See pp. 12-17, *infra*. More fundamentally, however, any conflict that does exist is not implicated by this case, as the court of appeals indicated in the decision below and Judge Flaum explained in detail in his concurring opinion (which petitioner does not even cite). See Pet. App. 14a, 16a-17a.

According to petitioner, the Second, Third, and Ninth Circuits apply SLUSA if the plaintiff's claim is "predicated on a misrepresentation or omission." Pet. 13-14. That standard was first articulated by the Third Circuit in *LaSala* v. *Bordier et Cie*, 519 F.3d 121 (2008), and *Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294 (2005). See *In re Kingate Management Ltd. Litigation*, 784 F.3d 128, 144 (2d Cir. 2015) (quoting *LaSala*, 519 F.3d at 141, and *Rowinski*, 398 F.3d at 300); *Freeman Investments, L.P.* v. *Pacific Life Insurance Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013) (citing *Rowinski* when articulating standard).

1. In the decision below, the court of appeals explained that each of petitioner's claims "depends on the omission of a material fact—that some mutual funds paid, and [LaSalle] kept, fees extracted from the 'swept' balances." Pet. App. 5a. In so construing the complaint, the court of appeals echoed the district court's determination that the alleged misrepresentations and omissions formed

"the *essence* of [the] amended complaint." *Id.* at 47a (emphasis added). Although the district court could not have known it was doing so, it used the exact same word the Ninth Circuit would subsequently use in formulating its standard: namely, that the misrepresentation or omission should "form the gravamen or essence of the claim." *Freeman Investments*, 704 F.3d at 1115; see Pet. 13. Under the majority's analysis, petitioner's claims—which "depend[] on" alleged misrepresentations that form "the essence" of her suit—would be precluded under the standard used in the Second, Third, and Ninth Circuits.

In his concurrence, Judge Flaum elaborated on why petitioner's claims would be precluded under that standard. As the Third Circuit requires, the alleged misrepresentation or omission in petitioner's complaint was "far from an inessential 'extraneous detail.'" Pet. App. 14a (quoting *LaSala*, 519 F.3d at 141); see *Freeman Investments*, 704 F.3d at 1115-1116 (allowing a breach-of-contract claim to proceed where the allegation of active concealment was not necessary to resolving the claim). Instead, petitioner's claims in this case "rested on" the alleged misrepresentation or omission. Pet. App. 14a.

The complaint confirms Judge Flaum's analysis. To prove her claim for breach of a fiduciary duty of "candor," petitioner would need to show that LaSalle failed to disclose its collection of the mutual-fund fees. Pet. App. 14a. Indeed, the complaint makes this clear, alleging that "[respondents] breached their duty of candor to [petitioner] and members of the [c]lass *when they failed to disclose* that they were receiving daily cash reinvestment (sweep) fees." *Ibid.* (quoting complaint) (emphasis added). Proving LaSalle's lack of "candor" requires, in the words of SLUSA, establishing the alleged "omission." 15 U.S.C. 78bb(f)(1)(A). The Third Circuit, as well as the Second and Ninth Circuits, preclude claims, such as this one, that

are "predicate[d]" on such an omission. See, *e.g.*, *Kingate Management*, 784 F.3d at 146; *Freeman Investments,* 704 F.3d at 1114-1115; *Rowinski*, 398 F.3d at 300.[3]

Petitioner's claim for breach of contract is also predicated on LaSalle's alleged failure to disclose its collection of the mutual-fund fees. The complaint alleged that "[respondents] breached their contract with [petitioner] and the other members of the [c]lass by receiving daily cash re-investment (sweep) fees * * * *without authorization, or disclosure to*, Custody Account holders." Pet. App. 16a (quoting complaint) (emphasis added). That is, LaSalle provided account holders with a list of potential mutual funds in which excess cash could be invested, but did not tell account holders that some of those funds were paying fees in return that LaSalle kept for itself. See *id.* at 47a. As Judge Flaum explained, the claim for breach of contract "inherently alleges a material misrepresentation or omission for the same reasons that the 'disclosure' language in [petitioner's] fiduciary duty claim does." *Id.* at 17a.

2. To be sure, Judge Hamilton reached a different conclusion in his dissenting opinion, construing the complaint as not depending on the misrepresentation or omission of a material fact. See Pet. App. 18a. But Judge Hamilton appears to have based his conclusion that petitioner raised "simple" claims for breach of contract and fiduciary duty and contract on the fact that the claims alleged only that LaSalle charged "unauthorized fees." *Ibid.* That is not correct, because the complaint also alleged that, in materials provided to account holders,

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[3] The Second Circuit's decision in *Kingate Management*, like the Ninth Circuit's decision in *Freeman Investments*, postdated the Seventh Circuit's earlier decision in *Brown*, on which Judge Flaum relied in describing the existing state of the law. See Pet. App. 11a-12a.

LaSalle (in violation of its fiduciary duty) omitted to disclose that some of the funds were providing fees that LaSalle retained for its own benefit and use. See *id.* at 47a.

More broadly, to the extent that Judge Hamilton seemingly construed the complaint differently from all of the other judges who reviewed it, that is not a basis for granting certiorari; this Court does not grant review to decide which lower-court judge properly construed the complaint. Cf. S. Ct. R. 10 (stating that a petition for certiorari "is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law"). If anything, the fact that judges have construed petitioner's claims differently would stand as a threshold impediment for further review, not a reason to grant it. In any event, the other judges' construction of petitioner's claims, not Judge Hamilton's, is plainly correct. Under that construction, petitioner's claims would be precluded regardless of the precise formulation of the legal standard.

B. The Courts Of Appeals Are Not In Meaningful Conflict Over The Standard For SLUSA Preclusion

Despite their use of somewhat varying formulations, the courts of appeals are not in meaningful conflict over the standard for determining whether a covered class action does in fact "alleg[e] * * * a misrepresentation or omission." 15 U.S.C. 78bb(f)(1)(A). While petitioner contends that the decision below conflicts with decisions of the Second, Third, and Ninth Circuits, it is clear that any superficial differences in those courts' articulations of the legal standards would not lead to different outcomes either in this case or in the mine run of other cases.

This Court does not grant review to resolve "minor linguistic discrepancies" in the formulation of the correct legal standard. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). Instead, the relevant inquiry is whether "it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.3, at 242 (10th ed. 2013) (*Supreme Court Practice*). That is decidedly not the case here—as this Court has seemingly recognized in denying certiorari in previous cases presenting the same issue. See *Brown* v. *Calamos*, 664 F.3d 123 (7th Cir. 2011), cert. denied, 567 U.S. 916 (2012); *Segal* v. *Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), cert. denied, 560 U.S. 925 (2010). There is no reason for a different outcome in this case.

1. Under the approach used by the Second, Third, and Ninth Circuits, SLUSA precludes a plaintiff's claim if a misrepresentation or omission is a "factual predicate" of the claim. *LaSala*, 519 F.3d at 141 (quoting *Rowinski*, 398 F.3d at 300). That is, the misrepresentation or omission need not be a "legal element" of the claim as a matter of state law. *Rowinski*, 398 F.3d at 300. Rather, "[t]o be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail." *LaSala*, 519 F.3d at 141. A misrepresentation or omission can be a factual predicate even if it is not explicitly alleged; whether "implicit or explicit," an allegation of a misrepresentation or omission upon which the claim depends will trigger SLUSA. *Ibid.*

For example, in *Rowinski*, the plaintiff alleged in the complaint that the defendant bank had provided the bank's clients with biased investment research. See 398 F.3d at 296. The plaintiff contended that the complaint

simply alleged a "straightforward breach of contract claim, *i.e.*, [that the defendant] agreed to provide unbiased investment research and failed to provide it." *Id.* at 300. But the Third Circuit disagreed, holding that the plaintiff's claims were based on the defendant's "disseminat[ion] [of] biased and materially misleading investment research," and, as such, "readily satisf[ied] the misrepresentation requirement under SLUSA." *Id.* at 299-300.

In *LaSala*, as is relevant here, the plaintiff brought a claim under Swiss law against a bank, alleging it had violated its duties to investigate various money-laundering transactions that had harmed the plaintiff and to freeze assets in the affected accounts. See 519 F.3d at 138, 141. This time, the Third Circuit held that SLUSA did not apply because any alleged misrepresentations were irrelevant to the bank's liability. See *ibid.* Unlike in this case, however, the plaintiff did not claim that the defendant bank had falsely promised or failed to disclose anything to the plaintiff class; instead, it had simply failed to comply with certain due-diligence requirements under Swiss law. See *ibid.*

2. In a series of cases, the Seventh Circuit has articulated a similar standard. Like the Third Circuit, it has made clear that a plaintiff cannot avoid SLUSA preclusion through labels or artful pleading; instead, a court must look to the substance of the claims. See *Brown*, 664 F.3d at 130. In so doing, the Seventh Circuit has explained, a court should consider whether the claims "could be pursued under federal securities law." Pet. App. 7a (citing *Holtz* v. *JPMorgan Chase Bank, N.A.*, 846 F.3d 928, 930-933 (7th Cir. 2017), pet. for cert. filed, No. 16-1536 (June 21, 2017)). But because the principal anti-fraud provisions of the federal securities laws also turn on the presence of a misrepresentation or omission, see, *e.g.*, 15 U.S.C. 77k (Section 11 of the Securities Act of 1933); 15 U.S.C. 77*l*

(Section 12 of the 1933 Act); 15 U.S.C. 78j(b) (Section 10(b) of the Securities Exchange Act of 1934); 17 C.F.R. 240.10b-5(b) (Rule 10b-5(b) thereunder), the inquiry as to whether a claim could be brought under the federal securities laws essentially asks whether the claim uses a misrepresentation or omission as a factual predicate. Given the seeming overlap in the standards, it is hardly surprising that, in the decision under review, the Seventh Circuit concluded that each of petitioner's claims "depends on the omission of a material fact." Pet. App. 5a.

Notably, the Seventh Circuit took much the same approach in *Holtz*, decided on the same day. There, the plaintiff alleged that the defendant bank had recommended investing in unfavorable proprietary funds as part of a "self-dealing scheme aimed at enriching themselves," while publicly representing that they were providing unbiased advice and investing in their clients' best interests. 16-1536 Pet. App. at 63a. Although the plaintiff argued that she had alleged a simple breach of contract, the Seventh Circuit rejected that assertion, concluding that SLUSA preclusion was warranted because "the suit depends on [the plaintiff's] assertion that the [defendant] concealed the incentives it gave its employees." *Holtz*, 846 F.3d at 930. Because the plaintiff could not prevail on her claim if the defendant bank had disclosed its conduct, the Seventh Circuit reasoned, "nondisclosure is a linchpin of this suit no matter how [the plaintiff] chose to frame the pleadings." *Ibid.*

The allegations at issue in *Holtz*, moreover, were essentially no different from those in the Third Circuit's decision in *Rowinski*. Both cases involve claims for breach of contract based on the failure by banks to disclose bias in financial recommendations to their customers. See *Holtz*, 846 F.3d at 932; *Rowinski*, 398 F.3d at 296. And

although the cases came from courts purportedly on opposite sides of the circuit conflict, both resulted in preclusion of the plaintiffs' claims under SLUSA. See *Holtz*, 846 F.3d at 932; *Rowinski*, 398 F.3d at 300.

There appears to be no material difference, therefore, in the application of the standard for SLUSA preclusion across the courts cited by petitioner. While those courts may have articulated slightly different standards, they use synonymous terms to determine whether those standards have been met, focusing on whether a plaintiff's claims depend on a misrepresentation or omission. In application, too, the courts' varying formulations have resulted in consistent outcomes across factually similar cases.

3. Another court of appeals, the Sixth Circuit, has expressly disagreed with one aspect of the standard applied by the foregoing courts. Like those courts, the Sixth Circuit considers the "substance of a complaint's allegations" instead of the claim's label, *Segal*, 581 F.3d at 310, and it recognizes that SLUSA "cannot be tricked" by artful pleading, *Atkinson* v. *Morgan Asset Management, Inc.*, 658 F.3d 549, 556 (6th Cir. 2011). In one respect, however, the Sixth Circuit has distinguished the standard articulated by the Third Circuit and later adopted by the Second and Ninth Circuits, insofar as that standard asks whether the alleged misrepresentation or omission is "material" to the claim. See *Segal*, 581 F.3d at 311-312. The Sixth Circuit has indicated it finds that undertaking unnecessary; in its view, SLUSA asks only whether the complaint alleges misrepresentations or omissions, "pure and simple." *Id.* at 311; see *Atkinson*, 658 F.3d at 555. Insofar as the Seventh Circuit's standard is not materially different from that of the other circuits, the Sixth Circuit may also disagree with the Seventh Circuit in that regard.

Any such disagreement, however, is irrelevant to whether the petition in this case should be granted. Petitioner wisely does not invoke the Sixth Circuit's standard or even cite any of the underlying Sixth Circuit cases. See Pet. 13-14. That is because there is no question that petitioner's claims would be precluded under the Sixth Circuit's more expansive (and defendant-friendly) " 'literalist' approach." Pet. App. 14a (Flaum, J., concurring) (quoting *Brown*, 664 F.3d at 127). Accordingly, even if there were a conflict between the Sixth Circuit's standard and those of the other courts of appeals, it is not a conflict implicated by the decision under review.

In any event, the Sixth Circuit has never actually applied its standard in a way that conflicts with a decision of any other circuit. In *Atkinson*, the Sixth Circuit precluded an action that, by the court's own description, would readily be precluded in the Third and Seventh Circuits. As the court put it, "[t]he crux of [the plaintiffs'] argument was that [the defendants] took unjustified risks in allocating the funds' assets *and concealed these risks from shareholders*." 658 F.3d at 552 (emphasis added); see *Daniels* v. *Morgan Asset Management, Inc.*, 497 Fed. Appx. 548, 554 (6th Cir. 2012) (holding claims that were "grounded in fraud" and depended on a material misrepresentation to be precluded under SLUSA). Similarly, in *Segal*, the plaintiff himself asserted that "the gravamen of [his] [c]omplaint [was] that the defendants did not deal honestly" with the bank's customers, an allegation he "corroborate[d] * * * with allegations of fraud, manipulation and 'scheme.' " 581 F.3d at 311.

While the Sixth Circuit's standard may yet prove to be materially different, therefore, it cannot currently be said with confidence that the Sixth Circuit would reach a different result from other circuits in "different cases with very similar facts." *Supreme Court Practice* § 4.3, at 242.

Any potential conflict does not warrant the Court's review—particularly where, as here, such a conflict would plainly not be implicated by the decision under review.

C. The Decision Below Is Correct

Finally, the court of appeals correctly held that SLUSA precludes petitioner's claims. The standard the court of appeals applied faithfully tracks the language of the statute. That is, it asks whether a covered class action, in substance, alleges 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). If it does, and none of SLUSA's enumerated exceptions applies, then SLUSA precludes the action. That is the case here, where the complaint alleges, in so many words, that a fiduciary did not reveal to its customers that it would be receiving fees from some of the securities investments it presented to those customers. See pp. 4-5, *supra*.

The allegations in this case, moreover, closely resemble those that this Court has held amounted to securities fraud in cases involving similarly worded provisions of the federal securities laws. In *Wharf (Holdings)*, for example, the petitioner argued, similar to petitioner here, that "interpreting the [Securities Exchange Act] to allow recovery in a case like this one will permit numerous plaintiffs to bring federal securities claims that are in reality no more than ordinary state breach-of-contract claims—actions that lie outside the Act's basic objectives." 532 U.S. at 596. This Court rejected that argument for the same reason the court of appeals did in this case: the plaintiff's claim was "not simply that [the petitioner] failed to carry out a promise to sell it securities," but instead that "[the petitioner] sold it a security (the option) while secretly intending from the very beginning not to honor the option." *Id.* at 596-597.

This Court reached a similar conclusion a year later in *Zandford*. There, the Securities and Exchange Commission filed suit under the federal securities laws against a securities broker that had promised to "conservatively invest" his clients' money, but then stole the proceeds of the investments. 535 U.S. at 815. The court of appeals held that the claim should be dismissed because the court was unwilling to "stretch the language of the securities fraud provisions to encompass every conversion or theft that happens to involve securities." *Id.* at 818. But this Court reversed, holding that the claim had been properly brought under federal securities law—even though it also satisfied the elements of wire fraud or simple theft—because the defendant had agreed to invest the securities "while secretly intending from the very beginning to keep the proceeds." *Id.* at 824.

So too here. Petitioner alleges the same type of secret intent, and failure to disclose, regarding LaSalle's plan to retain the fees it received as a result of securities purchases that account holders made. See Pet. App. 7a-8a. For much the same reasons given in *Wharf (Holdings)* and *Zandford*, that is sufficient to bring petitioner's claims within the ambit of SLUSA.

* * * * *

In sum, it is clear that the result in this case would be the same under any of the existing formulations of the standard for SLUSA preemption. In any event, the courts of appeals are not in meaningful conflict over that standard, even if they have employed somewhat varying formulations. And the court of appeals' decision is correct and consistent with the text of SLUSA. Under those circumstances, further review is not warranted. The petition for a writ of certiorari should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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