No. 15-134

IN THE

Supreme Court of the United States

SCHWAB INVESTMENTS, et al.,

Petitioners,

v.

NORTHSTAR FINANCIAL ADVISORS, INC., on behalf of itself and others similarly situated,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

Matthew L. Larrabee
Joshua D.N. Hess
Brian Raphel
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104
(415) 262-4500

G. Eric Brunstad, Jr.
Counsel of Record
Kate M. O'Keeffe
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Petitioners

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Northstar does not deny that, when it filed its original complaint challenging the Fund's investment strategies and alleging shareholder harm, it did not own, and indeed has never owned, any shares in the Fund. Thus, at the time Northstar filed its complaint, it was asserting the claims of others. It was not until several months later, when Northstar obtained an assignment of the claims of an actual shareholder (non-party Henry Holz), that Northstar acquired a cognizable stake in the outcome of the litigation.

The Ninth Circuit concluded that this post-filing assignment was sufficient to establish standing. Other courts of appeals, however, have concluded exactly the opposite: a litigant who does not own the claims it is asserting at the time of filing cannot cure its lack of standing by taking an assignment of the claims later. Northstar seeks to obscure this square conflict among the courts of appeals, but its efforts are unpersuasive. Contrary to Northstar's assertions, it does not matter that some of these other decisions involved patent rights or declaratory relief. What matters is that, in each of these other disputes, the litigants did not own the claims they were asserting at the time of filing, but acquired them later, and the relevant courts concluded that this was inadequate to establish standing under Article III.

Equally unpersuasive are Northstar's other arguments in opposition to certiorari on the first question presented. Contrary to Northstar's assertions, the decision below does not align with this Court's precedents regarding the jurisdictional effects of adding or dropping a party under Rule 21 because no party was ever added or dropped in this case. From the beginning of the litigation, Northstar has always been the only plaintiff; Mr. Holz is not, and never has been, a party. Accordingly, this is not a change-of-parties case, but rather it is a post-filing assignment-of-rights case, and the relevant decisions of this Court are those that establish that Article III standing is measured at the time of filing, not some later date. Further, the standing question involves an important, outcome-determinative issue that warrants review because it is one that has generated confusion among the lower courts, as amply illustrated by the decision below. Finally, Northstar's opposition on the ground that Petitioners delayed in litigating the standing question is legally and factually irrelevant because the decisions below did not give Northstar's delay argument any credit. In any event, questions of subject-matter jurisdiction are never waived—not even following trial.

Northstar's protestations regarding the second question presented in this matter fare no better. Contrary to Northstar's assertions, Petitioners have not mischaracterized the decision

below; it is Northstar that has mischaracterized Petitioners' argument. The decision below squarely held that the Trust's mandatory SEC disclosures formed the basis of a common-law contract with the Fund's shareholders, giving rise to a common-law breach of contract action. The Petition argues that this is an exceptionally important issue because, for the first time and contrary to applicable federal law, mutual funds may now be subject to common-law breach-of-contract claims based upon their compliance with mandatory federal disclosure requirements. Likewise, the Petition argues that the consequences of this decision are extreme and caustic to the securities market, which Northstar does not refute. Finally, contrary to Northstar's contentions, the contract issue is not premature: the court below reached and decided it as part of its holding, and review of its decision is thus now entirely ripe.

I. Certiorari Is Warranted On The Standing Question.

Northstar repeatedly asserts that certiorari is unwarranted on the standing issue on the theory that Petitioners waited for a period of time before challenging the district court's order stating that Northstar could cure its lack of standing by filing an amended complaint. BIO at 1, 8, 11, 15, 22, 23. This argument, however, is an irrelevant distraction. The courts below gave it no credit; nor should they have since it is

well-settled that challenges to a court's subject matter jurisdiction may be asserted at any time, *see Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (a "challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings" (citing *Mansfield, C & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884))), including after trial, *see Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1368 (Fed. Cir. 2010).

More to the point, Northstar does not deny that it lacked standing at the time the complaint was filed. *See* BIO at 6. Northstar also does not dispute that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). Rather, Northstar alleges that this case is just like *Mullaney v. Anderson*, 342 U.S. 415 (1952), in which the Court allowed a union's post-filing addition of two of its members to cure a potential standing deficiency.

Northstar's argument, however, ignores the crucial fact that *Mullaney*—as well as the other cases Northstar cites that relied on *Mullaney*—involved Federal Rule of Civil Procedure 21, which allows a court to "at any time, on just terms, add or drop a party." *Id.* at 417; *see also Newman-Green*, 490 U.S. at 832. As this Court has explained, Rule 21 "ha[s] long been an exception to the time-of-filing rule." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541

U.S. 567, 572 (2004); *see also Newman-Green*, 490 U.S. at 830, 832 (noting that "[l]ike most general principles … [the time-of-filing rule] is susceptible to exceptions," and that "it is well settled that Rule 21" is such an exception). This case, however, is *not* a Rule 21 case, and thus the exception recognized in *Mullaney* is irrelevant. Tellingly, the courts below did not refer to Rule 21 in their opinions; nor should they have, given that no party has been added or removed in this action—the only plaintiff has always been Northstar.[1] Northstar itself concedes that Mr. Holz, the shareholder from whom Northstar obtained an assignment, is not a party, *see* Corporate Disclosure Statement, BIO at *ii* ("Northstar received an assignment of claim from *non-party* Henry Holz") (emphasis added), and, indeed, he never has been. Thus, Northstar's repeated invocation of the jurisprudence surrounding Rule 21 is of no moment.

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[1] Northstar cites a Tenth Circuit case, *Kilbourn v. Western Surety Co.*, 187 F.2d 567 (10th Cir. 1951) for the proposition that "the Assignment clearly constitutes a change in or addition of a party." BIO at 13. However, *Kilbourn* is not a Rule 21 case and cannot be read to allow an assignment of a claim *by a non-party* to constitute the addition of a party *by a court* pursuant to Rule 21. Moreover, to the extent *Kilbourn* allowed a post-filing assignment of claims to establish standing, this only deepens the Circuit split identified in the Petition.

Because this case is not, as Northstar contends, like *Mullaney* "where standing was insured by a *change in party,*" BIO at 14 (emphasis in original), Northstar's related assertion that this matter is distinguishable from *Grupo Dataflux* falls flat. In *Grupo Dataflux*, the Court considered whether lack of diversity at the time of filing could be cured by a post-filing change in citizenship in light of the Court's practice of "adher[ing] to the time-of-filing rule regardless of the costs it imposes." 541 U.S. at 571. As is most relevant here, the Court in *Grupo Dataflux* specifically *rejected* the application of cases decided under Rule 21 because "[t]he purported cure arose not from a change in the parties to the action, but from a change in the citizenship of a continuing party." *Id.* at 575. The same is true in this matter. Because there has not been a change in parties in this case, Rule 21 is as irrelevant here as it was in *Grupo Dataflux*. And because there is no other applicable exception to the time-of-filing rule available here, dismissal is properly "the only option available." *Id.*

Contrary to Northstar's contentions, the decisions that Petitioners rely on in demonstrating a circuit conflict are directly on point. Each of these decisions holds that a post-filing assignment cannot cure a constitutional standing defect. While it is true that several of these cases involved patent infringement claims, Northstar incorrectly alleges that their holdings

are limited only to matters under the Patent Act. Article III standing is a threshold requirement for all cases in federal court, regardless of the subject matter or the existence of other statutory jurisdictional requirements. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *Alps South, LLC v. Ohio Willow Wood, Co.*, 787 F.3d 1379, 1382 (Fed. Cir. 2015) ("Before we may exercise jurisdiction over a patent infringement action … we must … satisfy ourselves that, *in addition to Article III standing*, the plaintiff also possessed standing as defined by § 281 of the Patent Act.") (emphasis added). Northstar's efforts to distinguish the decisions that establish a circuit split is once again entirely misguided because each is legally and factually on point.

For example, in *Abraxis*, the court began its analysis by noting that "[s]tanding is a constitutional requirement *pursuant to Article III* and is a threshold jurisdictional issue." 625 F.3d at 1363, (emphasis added). The court's conclusion that a plaintiff who lacked enforceable title to a patent at the time an infringement action was commenced also lacked standing was "[b]ased on [non-patent] Supreme Court jurisprudence" establishing that "[a] court may exercise jurisdiction only if a plaintiff has standing to sue on the date it files suit." *Id.* at 1364 (*citing Keene Corp. v. United States*, 508

U.S. 200, 207 (1993) and *Minneapolis & St. Louis R.R. v. Peoria & Perkin Union Ry. Co.*, 270 U.S. 580, 586 (1926)); *see also Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003) ("[R]egardless of whether the appellant had capacity to sue, it must establish that it had standing *under Article III of the Constitution* at the time it filed suit.") (emphasis added).

Northstar's attempt to distinguish Article III standing decisions in the declaratory judgment context is likewise unavailing. The decisions cited in the Petition make clear that the critical, relevant inquiry is constitutional standing, not some requirement specific to declaratory judgments. *See, e.g., Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1384 (Fed. Cir. 2010) (finding "no error in the district court's conclusion that ITI's supplemental complaint did not establish *an actual controversy* at the time of the original pleading") (emphasis added); *Suncom Mobile & Data, Inc. v. Fed. Commc'ns Comm'n*, 87 F.3d 1386, 1389 (D.C. Cir. 1996) (denying review because plaintiff "failed to allege that any of the contracts existed when it filed its petition … a critical time for *Article III standing analysis*") (emphasis added).

Finally, Northstar's bald assertion that there has been no prejudice in this matter, BIO at 23, is both untrue and irrelevant. It is

irrelevant because a court may not act without jurisdiction regardless of any question of prejudice. In addition, Petitioners have indeed suffered considerable prejudice. Petitioners have been forced to spend significant amounts of time, money, and resources litigating an action over which the federal courts have had no constitutional authority. Lacking such authority, the court below needlessly issued a misguided decision recognizing an erroneous cause of action against mutual funds and their advisors that jeopardizes the uniform administration of the Nation's securities laws and threatens harm to the mutual fund industry. Moreover, Northstar's argument that there is no prejudice because only "hyper-technical formalism" would require dismissal and refiling instead of an amended complaint, *id.*, could be made in every case where a plaintiff receives a post-filing assignment of claims. Were this reason enough to deny review, the issue would go unreviewed in perpetuity, thus effectively gutting the rule and permitting parties without standing to race to the courthouse, file speculative complaints, and acquire claims at a later date.

II. Certiorari Is Warranted On The Breach-Of-Contract Question.

Review is warranted on the second question presented because it is an exceptionally important issue. For the first time and contrary

to applicable federal law, the decision below establishes that mutual funds may now be subject to common-law breach-of-contract claims based upon their compliance with mandatory federal disclosure requirements. Northstar does not refute that the consequences of the Ninth Circuit's decision in this matter are caustic to the securities market and the mutual fund industry. Rather, Northstar seeks to obsure the analysis with another round of misguided contentions.

Contrary to Northstar's assertions, however, the Petition does not mischaracterize the decision below. Petitioners do not argue that the Ninth Circuit held that "all disclosures can create a contract." BIO at 25. Rather, the Petition quotes the ruling below that "'the mailing of the proxy statement and the adoption of the two fundamental investment policies after the shareholders voted to approve them, and the annual representations by the Fund that it would follow these policies are sufficient to form a contract between the shareholders on the one hand and the Fund and the Trust on the other.'" Pet. at 6 (quoting Pet. App. at 48a-49a).

Moreover, Petitioners are not, as Northstar suggests, asking the Court to determine whether Northstar's breach of contract claim is pre-empted by the Securities Litigation Uniform Standards Act prior to the district court's addressing that issue in the first instance. BIO

at 29. Rather, Petitioners are asking the Court to review the holding of the Ninth Circuit concluding that mandatory SEC disclosures may form a common-law contract, giving rise to a common-law damages action if breached. Northstar does not contend that a ruling in the district court on preclusion will obviate the Ninth Circuit's decision or its effects. Thus, its argument of prematurity is meritless—the contract question is properly before the Court as a fully ripe matter and is likewise outcome-determinative because a decision that the Ninth Circuit erred in recognizing Northstar's breach-of-contract claim would end litigation on that claim.

Northstar's argument that there is no conflict between the Ninth Circuit's decision and the federal securities laws because a breach-of-contract claim is "different and distinct from a federal securities claim," BIO at 30, entirely misses the point. The point is that, consistent with federal securities law and this Court's precedents declining to recognize novel theories of liability that Congress has not itself prescribed, there cannot be any such common-law cause of action based on a fund's mandatory SEC disclosures. If Congress had wished to prescribe such a remedy, it could have. Plainly it has not, and Northstar's contract theory is simply an attempt to get around the fact that Congress has not created a private right of action for Northstar's particular complaint.

As is particularly relevant here, section 13(a)(3) of the Investment Company Act of 1940 ("ICA") prohibits investment companies, including mutual funds, from deviating from the investment policies pronounced in the prospectus. 15 U.S.C. § 80a-13(a). Notably, Congress did not provide a private right of action under section 13, instead placing oversight of mutual funds with respect to such matters in the hands of the fund's board of trustees and bestowing enforcement power on the SEC. *See* Br. of Pacific Life Fund Advisors LLC, Capital Research and Management Co., Assetmark, Inc., Wells Fargo Funds Management, LLC, and Russell Investments as Amici Curiae in Support of Petitioner at 9. Congress's decision not to permit a private right of action under section 13(a) is clear, as has been recognized by several courts, including a different panel of the Ninth Circuit in this case. *See* Pet. App. 130a; Br. of Mutual Fund Directors Forum as Amicus Curiae in Support of Petitioners at 13 ("Directors Br."). The decision below is entirely inconsistent with Congress's choice because it effectively grants a private remedy for breach of an obligation different from what Congress has prescribed.

Although section 13(a) is particularly relevant in demonstrating the non-viability of Northstar's claim, reference to other federal securities laws also compel this conclusion, as discussed in greater detail in the Petition. *See* Pet. at 35-40. These additional laws establish a

marked preference for federal law as the governing law in the securities arena and reinforce "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 78 (2006). The decision below is unavoidably inconsistent with this interest.

Finally, the breach-of-contract question is of exceptional importance due to its profound impact in the securities area, particularly on the mutual fund industry and fund directors. As noted by the Investment Company Institute ("ICI") in its amicus brief, "mutual funds are the primary vehicle for investing and retirement savings in the United States." Brief of Amicus Curiae Investment Company Institute and Independent Directors Council in Support of Petitioners at 6 ("ICI Br."). And as noted by the Mutual Fund Directors Forum in its amicus brief, existing federal laws provide these investors with "ample means to seek redress for injuries" and preserve only certain, specific rights under state law, *see* Directors Br. at 15-16, which do not include common-law breach-of-contract claims. By allowing a novel breach-of-contract cause of action arising from statements in a fund's prospectus, the Ninth Circuit has now opened the door to costly litigation, which costs will undoubtedly be shouldered by investors in these funds, either directly or through their retirement programs. *Id.* at 19; ICI Br. at 8. In

addition, treating ever-changing disclosures as contracts creates an unmanageable situation for mutual funds, subjecting them to the disfiguring complexity of a patchwork of disparate and inevitably conflicting common-law contractual obligations. *See* Pet. at 30-35. Because of the exceptional importance of the issue, certiorari is therefore warranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

September 8, 2015 *Counsel for Petitioners*