IN THE SUPREME COURT OF THE UNITED STATES

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MERRILL LYNCH, PIERCE, :

FENNER & SMITH, INC., :

Petitioner, :

v. : No. 04-1371

SHADI DABIT. :

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Washington, D.C.

Wednesday, January 18, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

JAY B. KASNER, ESQ., New York, New York; on behalf of the Petitioners

THOMAS G. HUNGAR, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

[11:16 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in number 04-1371, Merrill Lynch, Pierce, Fenner & Smith versus Dabit.

Mr. Kasner.

ORAL ARGUMENT OF JAY B. KASNER

ON BEHALF OF PETITIONER

MR. KASNER: Mr. Chief Justice, and may it please the Court:

In an effort to limit State-law securities class-actions which undermine the market for nationally traded securities, Congress enacted SLUSA, a statute of broad preemption. SLUSA, which is reprinted at page 8(a) of Petitioner's blue brief, preempts, subject to three specific statutory extensions, all State-law-covered class actions, quote, "by any private party who alleges misrepresentations, omissions, or fraudulent behavior in connection with the purchase or sale of a covered security." The Second Circuit erred in implying an exception, that nowhere appears in the statutory language, and is wholly at odds with the purpose in the enactment of the statute for holders claims, a type of claim in which a plaintiff alleges, "I did not purchase" or "I did not sell, but would have, had I known the allegedly false

information," a type of claim which this Court, in Blue Chip Stamps, over 30 years ago, recognized as the most vexatious and abusive type of securities class-action claims.

The court below erred, for a number of different reasons. First and foremost, it completely violated the natural meaning of the statute. As I have mentioned, an examination of SLUSA, beginning at page 8(a), reflects that no covered class action may be maintained, quote, "by any private party," a clause that this Court, time and again, has interpreted as perhaps the broadest way of phrasing "any and all private parties" making certain types of allegations. Those allegations appear in (a) or (b), focusing on the conduct of the defendant in connection with the purchase or sale of a covered security.

Now, Congress could have -- had it intended to inject a purchaser/seller limitation, consistent with what the court below concluded, Congress could have phrased that language differently. As the Court is aware, in the both the 1933 and 1934 acts, Congress has made express causes of action, subject to an explicit purchase or seller requirement. For example, section 11 of the '33 act affords a private right of action to purchasers of securities in registered offerings. Section 12 affords a

private right of action to persons from whom an offer or sale of securities. Section 9(e) of the '34 act, similarly, affords a purchase or seller requirement.

Significantly, SLUSA nowhere speaks in terms of a purchase or sale. And it could have. For example, Congress could have provided that no covered class action by any private party alleging "his or her sale" of a covered security is preempted. It could have said, "Any private party alleging a misrepresentation or omission of a material fact in connection with the plaintiff or that party's purchase or sale." It did not.

The decision of the court below is also at odds with this Court's teaching in United States versus O'Hagan, which was decided 1 year before SLUSA was enacted by Congress. In United States versus O'Hagan, this Court concluded that the so-called "misappropriation theory" stated a viable claim in a criminal case brought by the United States Government. In responding to an argument by the defendant that no one involved that had been defrauded purchased or --

JUSTICE STEVENS: May I just ask you this question about the plain language? If the word in 1(f)(1)(A) had not been "in connection with the purchase of sale -- sale of security," had been "in connection with his or her purchase or sale," then it would have been

covered, would it not?

MR. KASNER: Justice Stevens, if, by "his or her," it's referencing "any private party," I would agree with that. That would be a different case in --

JUSTICE STEVENS: So, the question is whether we should construe the word "the" to be the functional equivalent of "his or her."

MR. KASNER: In essence, Justice Stevens --

JUSTICE STEVENS: Is that true?

MR. KASNER: -- that's correct. And I think that that question has been answered by this Court, on a number of different occasions. Again, in United States versus O'Hagan, this Court concluded that the "in connection with the purchase or sale of a security" does not mean "in connection with the purchase or sale by another party to the securities transaction," but, rather, means "in connection with the purchase or sale by anyone."

JUSTICE SCALIA: Mr. Kasner, the -- does the Securities and Exchange Commission have enforcement authority in this -- in this area?

MR. KASNER: It does, Justice Scalia.

JUSTICE SCALIA: Have they issued any rules or regulations on this -- on this point?

MR. KASNER: The point being, Your Honor, whether --

JUSTICE SCALIA: On the point that you're arguing, whether the critical language means the person's own sale, or not --

MR. KASNER: Yes, Your Honor. In adjudicatory proceedings referenced in our brief, the SEC has unanimously, and uniformly, taken the position that it does not. In briefs to this Court in criminal prosecutions, in civil prosecutions, the Government has consistently taken the position, as it has in this case, as an amicus, and as it did in the court below.

JUSTICE SCALIA: Is it your position that we owe deference to the interpretation of the SEC?

MR. KASNER: That is our position, Your Honor. We do take the position that this Court should defer to the views of the SEC on that issue. What that deference is, should it be Chevron or Skidmore, is not a question Your Honor has asked. I'm happy to say that we believe, vis-a-vis 10(b)(5) --

JUSTICE SCALIA: Well, if it's just Skidmore, forget about it.

[Laughter.]

JUSTICE SCALIA: I mean, that's --

MR. KASNER: Well, Your Honor, I actually carefully studied yesterday's opinion, where this Court discussed the Skidmore deference, and, either way, we

think that this is -- the statute is so clear that, deference or none, there really is no other way to read the language of the statute.

As I say, this Court, in United States versus O'Hagan, concluded squarely that this language does not mean the purchase or sale of the plaintiff's securities. Justice O'Connor's concurring opinion, joined in by Justice Stevens, in the Holmes case makes that same point. Significantly, Your Honors, the "in connection with" language, as a statutory matter, has consistently been construed by the Securities and Exchange Commission, and by this Court, as one of incredible breadth. Most recently, in United States versus Zandford, this Court concluded that the "in connection with the purchase or sale" language means anything that coincides with a securities transaction. And what is significant in this case -- it is conceded by the Respondent at page 8 of his brief -- that the conduct alleged by the plaintiff below is in connection with the purchase or sale of securities. There really can be no other conclusion. At myriad paragraphs in the pleadings, appearing, among others, at joint appendix 53, paragraph 4; joint appendix 53(a), paragraph 5; joint appendix 59 to 60 --

JUSTICE GINSBURG: Mr. Kasner, may I just interrupt those references to ask you -- one could agree

that, for SEC-enforcement purposes, for prosecutorial purposes, the "in connection with" is as broad as you suggest. But for purposes of private actions, it isn't that broad; it is limited, as this Court said in Blue Chip Stamps. It is possible for the same words, even in the same statute, in difference contexts, to mean different things.

MR. KASNER: Justice Ginsburg, I believe that this Court has answered Your Honor's question in the Blue Chip Stamp case, where it specifically rejected that sort of an approach, and the one that was consistent with the court below. What the Court, in Blue Chip Stamp -- which, of course, was a civil case involving an alleged holder's claim was a class action -- what this Court said, for purposes of a civil proceeding, is, "purchase or seller requirement nowhere appears in the statutory language." The statute clearly says "in connection with the purchase or sale of securities." But, as a statutory matter, this Court concluded, Your Honor, that a violation of 10(b)(5) had been alleged, notwithstanding going on to conclude that the plaintiff could not recover, as a matter of private cause of action.

So, we understand -- we believe, Your Honor, that it -- and it is undisputed on this record -- that all parties agree, as the court below concluded, that this --

Congress intended to impart 10(b)(5) interpretation as a statutory matter into SLUSA. We also think, Justice Ginsburg, that, were Your Honors to conclude that somehow "in connection with" means something different in a civil context, a narrower reading than in the broader context, that would, of course, violate, in our view, the rule of lenity that is applied by this Court. It would also mark what we believe to be the first time, insofar as we have been able to determine -- and Respondent cites no authority to the contrary -- in which the same provisions in a statute that have civil and criminal --

JUSTICE GINSBURG: Would you explain the rule of lenity? Because, on criminal, it is as broad as can be. I didn't know that there was a rule of lenity that applied strictly to civil liability.

MR. KASNER: Your Honor, we -- and we have cited authority, including the Leocal decision of this Court, last year, in which, for statutory construction purposes, where you have a civil and a criminal statute that has both elements to it, the rule of lenity would dictate that the narrower reading be the one that is written. So, in other words, if this Court were to have concluded, in Blue Chip -- excuse me -- in United States versus O'Hagan, that, as a criminal matter, the "in connection with" language is not tethered to the purchase or sale by a

particular party in the case, that is a broader reading than the reading that the court below adopted in a civil case. And so, what we're urging is that the rule of lenity would suggest that, if this Court, in U.S. v. O'Hagan, took the view that the "purchase or sale" requirement does not apply in a criminal context, that should also apply in a civil context, that a narrower reading should not be imparted into a civil context than you would find in a criminal context.

We also --

CHIEF JUSTICE ROBERTS: But one reason you might want to adopt a narrower reading, though, is, we're dealing here with the preemption provision. It's one thing to say that, when you're talking about the SEC's enforcement powers, you adopt a broad reading; but it's quite another thing, when you're talking about displacing State law, that you would necessarily adopt the same broad reading.

MR. KASNER: Mr. Chief Justice, I think, in this case, there is no other purpose to be served by this statute than to preempt. To the extent that embedded in Your Honor's question is a question with respect to the so-called presumption against preemption, we don't think that those concerns, or the concerns to which Your Honor just referred, apply in this case, because the statute is

clear; there is no ambiguity in the language that Congress used, and hence -- and it would have made no sense, Mr. Chief Justice, for Congress to have --

CHIEF JUSTICE ROBERTS: But there's a lot of -- I think our cases establish that a phrase like "in connection with" carries with it a lot of ambiguity. You don't know exactly how rigorous the connection has to be. I mean, a auto accident by a broker who's leaving his office -- he wouldn't be in the office if he weren't buying and selling securities. I mean, is that auto accident "in connection with the purchase and sales of securities"? No. And yet, you know, theoretically it could be. It's a -- there's a lot of ambiguity in determining how much breadth to give that phrase.

MR. KASNER: Well, Mr. Chief Justice, I would agree with you that, in terms of deciding, for -- as a substantive matter, for purposes of 10(b)(5), "in connection with," such as in SEC versus Zandford, how far the outer reaches of the "in connection with" language go may well be susceptible of differences of opinion. There is no difference of opinion to which there can be any disagreement, in this case, about the plain language of the preemption, because the conduct -- no matter what the conduct is that is involved "in connection with the purchase or sale of securities," one thing that is totally

crystal clear, based on this Court's cases and congressional purpose, is that the "in connection with the purchase or sale" language, as used here, does not restrict its application to the purchase or sale by the plaintiff such that --

JUSTICE STEVENS: No, but that's a normal reading of the words, wouldn't you -- when you say a purchase or -- it normally would be "in connection with the purchase or sale of securities by the party to the litigation." That would be your first take on it. But then you say, "Well, we have cases out there that construe it a little more narrowly." And is it not somewhat unusual -- and I know it's not totally unusual -- for Congress to preempt a State cause of action that without -- where there is no parallel Federal remedy.

MR. KASNER: Justice Stevens, one misimpression I believe that the court below was under, and I believe is perpetuated by Respondent in his amici, this statute does not preempt a State-law claim. This is not like the cases, for example --

JUSTICE STEVENS: It just preempts class actions.

MR. KASNER: It preempts class actions. And it's significant, because Congress made a policy judgment. Originally, as originally introduced in the House, SLUSA

would have preempted all State-law securities cases. All of them. As the statute wound its way through the House and the Senate, it -- and principally in response to testimony by the SEC Commissioner Levitt, who went to the Hill three separate times on this legislation -- specific statutory exemptions were put in.

But it -- getting back, though, to the purpose behind --

JUSTICE STEVENS: In going through that legislative history, did you find any evidence that they intended to preempt any State-law claims that were not -- did not have a parallel Federal claim?

MR. KASNER: Justice Stevens, the --

JUSTICE STEVENS: Other than the language of the statute?

MR. KASNER: Well, we believe that the --

JUSTICE STEVENS: Yes.

MR. KASNER: -- this inquiry --

JUSTICE STEVENS: But you --

MR. KASNER: -- begins and ends --

JUSTICE STEVENS: -- you brought up the legislative history.

MR. KASNER: Yes.

JUSTICE STEVENS: So, you're an expert on that subject.

[Laughter.]

JUSTICE STEVENS: Yes.

MR. KASNER: Your -- Justice Stevens, the only reference to the purchaser-or-seller issue is one that is referenced by the Respondent. And, in that instance, a professor from Cornell, Professor Painter, went to the Hill, and he said, "If you enact this statute, you are going to be closing off claims of people who are not purchasers or sellers, because those cannot be bought in the Federal court."

But back for a moment, though, to the issue of what is not preempted in the policy behind this statute, there was another component that Congress was seeking to remedy here, and that was the so-called "safe harbor." In 1995, when Congress enacted the Private Securities Litigation Reform Act, one piece of that was an effort to encourage public companies to make predictive statements publicly. There had been a rash of litigation, at the time, against public companies whose predictive statements proved false. And so, Congress said, "Wait a minute. We will allow you an insulation from liability, if your forward statements prove false, if the plaintiff cannot allege either that they were made with actual knowledge or not accompanied by meaningful cautionary language."

Another purpose of this statute was to --

JUSTICE SOUTER: May I interrupt? Because I'm --

MR. KASNER: Yes.

JUSTICE SOUTER: -- your time is running out.

MR. KASNER: Yes.

JUSTICE SOUTER: Is my understanding correct that, on your reading, State class actions of less than 50 parties are also left unpreempted?

MR. KASNER: Justice Souter, the definition -- yes. The answer to --

JUSTICE SOUTER: Okay.

MR. KASNER: -- your question is, yes.

JUSTICE SOUTER: So --

MR. KASNER: The definition --

JUSTICE SOUTER: -- individual actions and small State class actions.

MR. KASNER: Individual actions, less than 50 people, arbitrations, public enforcement.

And, with that, Mr. Chief Justice, I would like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kasner.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. HUNGAR: Thank you, Mr. Chief Justice, and

may it please the Court:

The fundamental flaw in the Court of Appeals analysis is that it requires the phrase "in connection with" to be given two different and irreconcilable interpretations, depending on the identity of the plaintiff. Nothing in the text or history of the securities laws justifies that implausible interpretation.

The Securities and Exchange Commission --

JUSTICE STEVENS: Mr. Hungar, I just wonder if that's correct. Is -- am I not right to say that the word "the" had been read to mean "his or her," that argument would not apply?

MR. HUNGAR: I think that's correct, Justice Stevens, but --

JUSTICE STEVENS: Well, then you don't have to have differing interpretations of "in connection with." You just have to know what the word "the" means.

MR. HUNGAR: Well, the "in connection" -- that's not the approach that the Court of Appeals took, of course, but -- and also, as Mr. Kasner indicated, that issue has been dispositively resolved by this Court and the Commission in concluding that the purchaser/seller rule is not a limitation on the scope of the prohibition in section 10(b). And if your interpretation were the one that were adopted, that would not be the case.

JUSTICE SCALIA: I always thought "the" meant "the."

[Laughter.]

MR. HUNGAR: Certainly, that would be our submission.

JUSTICE SCALIA: And "his or her" means "his or her."

MR. HUNGAR: Yes, Your Honor. And, again --

CHIEF JUSTICE ROBERTS: No, but you --

MR. HUNGAR: -- if it --

CHIEF JUSTICE ROBERTS: -- think it means "any."

MR. HUNGAR: I'm sorry?

CHIEF JUSTICE ROBERTS: You think it means "any," right? You're reading "the" to mean "any."

MR. HUNGAR: Right, it's "the" -- well, it's "the," in the sense of "the activity of purchasing and selling securities," yes. It's -- and that's how this Court has interpreted, in the O'Hagan case, for -- if that interpretation -- if "the" were read as "his or her," then it's impossible to see how the SEC could bring an enforcement action, or the Justice Department could bring a prosecution, in a case like O'Hagan, where the -- where the Court specifically said that the purchaser or seller was not defrauded. It's not that -- it's not true that section 10(b) requires that the purchaser or seller be

defrauded. And so, we submit that this would be --

JUSTICE STEVENS: Well, it certainly doesn't require the Commission to be a purchaser or seller, either. You know --

MR. HUNGAR: Well, we certainly would agree with that, Your Honor, that --

JUSTICE STEVENS: Yes.

MR. HUNGAR: But, more generally, it doesn't require that there be a purchaser or seller who's defrauded, and yet the purchaser/seller rule, for the purpose of implied actions, does require that.

Justice Stevens, you asked about whether there is any indication in the legislative history that Congress intended this act to preempt class-action claims where there would be no Federal remedy. The answer to that is, absolutely yes. It is perfectly clear from the legislative history that Congress knew, and expected, that claims that could be brought under State law as class actions, such as aiding-and-abetting claims or negligent-misrepresentation claims, claims that would not satisfy the Federal --

JUSTICE STEVENS: Right.

MR. HUNGAR: -- scienter requirements for -- and, of course, the claims that would not satisfy the requirements of the PSLRA. None of those could be brought

in Federal court, because they're barred by the various provisions of Federal law.

JUSTICE STEVENS: No, but they would be at -- adjudged under a different standard, you're dead right. As far as the parties involved, the -- that's what I was really asking.

MR. HUNGAR: Well, in cases where the -- where the only claim is against aiders and abetters, those parties would be -- would be out of court; or, likewise, cases where parties could not satisfy the scienter requirement, those parties would be out of court. So, Congress knew that it would be foreclosing remedies for certain categories of claims, and that was part of the point of the act, as the conference committee report makes clear.

JUSTICE GINSBURG: What about the --

MR. HUNGAR: Congress was --

JUSTICE GINSBURG: -- the claim that's made here, the second claim, where the broker said, "We lost clients, so -- as a result of this deception -- and we want to be compensated for that," nothing about the inflated price of the security --

MR. HUNGAR: Your --

JUSTICE GINSBURG: -- just that "our clients don't trust us anymore, because we gave them such bad

advice."

MR. HUNGAR: Your Honor, the -- that issue is not before this Court --

JUSTICE GINSBURG: I know, but I --

MR. HUNGAR: -- because it was not --

JUSTICE GINSBURG: -- wanted to know what the Government's position was on that claim. Could that be brought in a State court --

MR. HUNGAR: The --

JUSTICE GINSBURG: -- even as a class action?

MR. HUNGAR: The Commission addressed that question in its amicus brief in the Court of Appeals, and took the position that that claim was not in connection with the purchase or sale of securities, because the injury occurs after the fraud has been completed, and is -- and has to do with the lost future relationship, rather than fraud in connection with the purchase or sale of securities. And so, we didn't address that in our brief here, obviously, but the Commission took the position, below, that that would not be preempted, because it's not in connection with the purchase or sale of securities.

JUSTICE GINSBURG: How do you deal with the Court's -- the footnote in the Blue Chip Stamp -- that the court says -- in the Federal court -- "these 10(b) actions have to be limited to actual purchasers and

sellers," but that limitation is attenuated, because deserving claims by nontraders would lie under State law, including the very suit that was involved in Blue Chip Stamps and in the Second Circuit case that paved the way for Blue Chip?

MR. HUNGAR: Your Honor, that was an accurate description of the state of the law, as it existed at the time, at least in theory, although, as a practical matter, Respondents have not been able to point to a single reported case a -- of a holder class action in State court prior to the adoption of the Uniform Standards Act. So, while it was true, as a theoretical matter, that such claims could be brought under the law of some States, there are -- there is no history of State class actions in this area, which is one of the reasons why we think the reliance on the assumption of nonpreemption makes no sense here. Securities class actions prior to the PSLRA were brought in Federal court, and it was only the PSLRA that resulted in cases, such as the type of case at issue here, being brought in State courts. And Congress -- once it saw that problem, Congress was concerned that the requirements of the PSLRA were being evaded, and it was also concerned, as the conference committee report makes clear, that, now that these securities class actions were being brought in State court, there was the potential

danger of 50 varying State standards being applied, as this very case suggests, and Congress acted to remedy both of those problems, as the conference committee report makes clear, both the risk of nonuniformity in securities class actions that are targeted by the act, and the risk of evasion of the PSLRA.

Respondent's position would frustrate both of those objectives, because it would -- it would permit the most abusive category of lawsuits to proceed in State court, and it would permit such holder claims to be brought -- for instance, based on negligence, if State law permitted that; based on conduct that would be protected by the Federal safe harbor for forward-looking statements under the PSLRA. So, the PSLRA protections would be frustrated by their interpretation.

So, the very goals that Congress explicitly sought to achieve, stated in the -- in the text of the statute, in the purposes section and also in the conference committee report, would be frustrated. And, again, that approach requires the Court to accept an inconsistent interpretation of the text of the "in connection with" requirement, depending on the identity of the plaintiff, which would be an extraordinary way to construe a statute, particularly when there's nothing in the legislative history that provides even a hint of a

suggestion that Congress would have intended that result.

And with respect to Blue Chip, Your Honor, it's important to remember what Blue Chip was doing. Blue Chip was not a case about the scope of the "in connection with" requirement or the section 10(b) prohibition. Instead, it was a case about what to infer about what Congress would have wanted to authorize as an -- as a right of action, if it had addressed the question. And that's why the Blue Chip court made very clear that the conduct at issue there involving injuries to holders can be a violation of section 10(b) -- i.e., it can be in connection with the purchase or sale of securities -- it's just that they did not think that Congress would have wanted to authorize a private right of action.

So, again, when we're talking about the scope of the "in connection with" requirement, which is what is at issue here, that approach is the same approach that should be followed here, the same approach that was in -- followed in O'Hagan and in Zandford, and compels the conclusion that, since the conduct at issue here is unquestionably "in connection with the purchase and sale of securities," as this Court has construed that phrase, it is preempted by the Uniform Standards Act.

If the Court has no further questions, I thank the Court.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF RESPONDENT

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Our position is that SLUSA does not preempt class actions asserting holder claims. Congress incorporated this Court's interpretation of "in connection with" from Blue Chip Stamps when it enacted SLUSA. SLUSA rechanneled State suits to Federal court. It was not designed to eliminate State remedies that could not be pursued as Federal 10(b)(5) claims. That interpretation is the better reading of the text, the context, and the history of SLUSA's handling of private securities actions.

If I could start with the text --

JUSTICE KENNEDY: Can you tell me, do you agree that a holder action falls within 10(b)(5), generally?

MR. FREDERICK: No, because this Court, in the Blue Chip Stamps case, said that it did not. In footnote 5, Justice Rehnquist --

JUSTICE KENNEDY: But what about enforcement actions taken by the --

MR. FREDERICK: In enforcement --

JUSTICE KENNEDY: -- SEC?

MR. FREDERICK: -- actions, the SEC can bring enforcement authority, pursuant to 10(b)(5). And so, to that extent, misconduct that would be connected to what, in a private context, would be deemed a holder claim, does fall within the SEC's --

JUSTICE KENNEDY: But then, the --

MR. FREDERICK: -- jurisdiction.

JUSTICE KENNEDY: -- then it does fall within -- holder actions do fall within 10(b)(5), for some purposes.

MR. FREDERICK: They do, for enforcement purposes; they do not, for private civil-action purposes.

JUSTICE KENNEDY: So, you want us to interpret the text two ways, depending on the purpose.

MR. FREDERICK: No. What I want you to do is to understand what Congress intended. And what Congress intended, in SLUSA, I think is quite clear if you start at the beginning of the statute and you just start reading your way through it, because what Congress did in SLUSA was attempt to stop a flight of cases that had been brought in Federal court heretofore, but were migrating to State court, Congress perceived, as a result of the enactment of the PSLRA.

Section 2 of SLUSA -- and it is very important, Your Honors, that you look carefully at section 2 of SLUSA, because it has five congressional findings. They

are not adequately briefed, or even discussed, by the Second Circuit, but one of them says that the PSLRA sought to prevent abuses. The second one says, since an enactment of that, Congress perceives that a number of securities class-action lawsuits have shifted from Federal to State courts. The third one says, that shift has prevented the act from achieving its objectives. The next one says, State securities regulation is of continuing importance. And the then, the fifth one says, in order to prevent certain State private securities class actions alleging fraud from being used to frustrate the objectives of the PSLRA, it is appropriate to enact these national standards.

JUSTICE SCALIA: The Government doesn't say that "all" are covered. The Government acknowledges that there are some actions that could still be brought in State court.

MR. FREDERICK: The point, though, Justice Scalia, is that what Congress, in the PSLRA, was doing was attempting to ratchet up the pleading requirements for Federal-law claims.

JUSTICE SCALIA: So -- it's so counterintuitive. As the Government points out, these holder claims lend themselves to abuse much more than do the narrow purchase-and-sale claims.

MR. FREDERICK: Absolutely --

JUSTICE SCALIA: And why --

MR. FREDERICK: -- not.

JUSTICE SCALIA: -- why the Government would want to police the one, and let the other, you know, proliferate, seems very strange to me.

MR. FREDERICK: That's not correct, Justice Scalia. And it's important to emphasize this. What the Court addressed in the Blue Chip Stamps case was a very different kind of case. It involved nonpurchasers. And the Court reasoned that it would be speculative for somebody out there to say, "Well, I would have purchased the security, had I known." A holder claim, as recognized for a century in various State courts, involves a claim by somebody who holds a security and is induced by fraud not to sell that security. The restatement set of torts, section 525, recognizes that the fraud by forebearance of -- to cause you not to take an action is just as much a fraud as one that --

CHIEF JUSTICE ROBERTS: But the --

MR. FREDERICK: -- induces you.

CHIEF JUSTICE ROBERTS: But the fraud is caused -- the fraud causes other people to want to buy the security. They do so at a higher price. It causes the price to go up. It's "in connection with a purchase or

sale," maybe not of the holder's securities. But it's certainly -- the holder's claim wouldn't exist, but for purchases and sales that caused the price to go up.

MR. FREDERICK: In most circumstance, that's correct, Mr. Chief Justice. But that, I don't think is material. The level of damages that a holder sustains should not determine what the elements of the liability are. And what is striking about the Government and Merrill Lynch's position here is that intentional fraud is going to be given a pass because of those persons who are uniquely harmed, because, for 20 years --

CHIEF JUSTICE ROBERTS: But what your clients want to do is cash in on the fraud. They don't -- their claim is that they didn't get to sell the stock at an inflated price to somebody who didn't know about the fraud. That's the damages that they want to collect. And that seems to be an odd claim to recognize.

MR. FREDERICK: That's the same kind of claim that in -- to get back to Justice Scalia's question -- arises in the purchaser/seller context. The only difference is that the measure of damages is computed by when you purchase or sell, as opposed to when you bought it, before the fraud occurred. I mean, Wall Street has been telling investors, for two or more decades, "Buy and hold. Rest your retirement, hold your securities."

JUSTICE BREYER: In that --

MR. FREDERICK: In --

JUSTICE BREYER: -- in -- suppose a person bought the stock at price 30 before any fraud took place, and then he holds it, and then the fraud, and then, subsequently, the word of the fraud gets out, the price falls a lot, and he sells it. Does he have a claim, under Federal -- ordinary -- you know, does he -- can he go into Federal court?

MR. FREDERICK: No.

JUSTICE BREYER: No.

MR. FREDERICK: Blue Chip --

JUSTICE BREYER: Okay.

MR. FREDERICK: -- Stamps said no.

JUSTICE BREYER: Yes.

MR. FREDERICK: In State courts, in the Weinberger case that we cite, they -- they very carefully say this was not a State-court class action, but what Judge Friendly, in the Weinberger case, addressed was a State-law holder --

JUSTICE BREYER: All right, then --

MR. FREDERICK: -- class action --

JUSTICE BREYER: -- then -- I see that -- then what's worrying me is this, that -- one thing worrying me is that -- let's take an ordinary buyer case. All right?

And what happened is that the -- some buyers would like to bring a fraud suit in Federal court. They have to go to Federal court now. They can't go into State court. But they have a little brainstorm, or the lawyers do, and they say, "Well, in any case where a buyer would have a claim, and we don't want to go into Federal court, there surely are going to be a class of holders that would also have the kind of claim you say." So, there we are, same actions, all in the State court, just happens to have found a different class of claimant. And there always will be such a class.

MR. FREDERICK: There will be, in most circumstances. There are some circumstances where harms are unique to holders. But, Justice Breyer, can I point out to you that, in the antitrust context, there is, under Illinois Brick, a requirement that you must be in the direct chain, in a direct purchaser, but there are some 30 States that have allowed standing for people --

JUSTICE BREYER: Well, that's fine. And I --

MR. FREDERICK: -- that are indirect purchasers.

JUSTICE BREYER: -- and what I'm not facing, in the antitrust area, is what, it seems to me, on your interpretation now, would be, Congress passes a law, which becomes a futile act, because what they're anxious is -- to do is to get the cases in the class actions -- not all

the cases -- but the class actions in the Federal court. And then, in every single case, or 99.999 percent, where we've kept this action out of Federal court, there's going to be a comparable action, with holders as the plaintiff, in a State court.

MR. FREDERICK: Well --

JUSTICE BREYER: Now, what -- that's a -- my concern. What do you --

MR. FREDERICK: And let me address that this way. What court -- what -- Congress was very clear in the legislative debates, was -- it did not want to cut off meritorious claims. It simply wanted to rechannel them.

JUSTICE BREYER: Can you -- can you ease my concern there? Is there anything you can say that could ease my concern that we'll have the same set, that they'll just be in State court with a different class?

MR. FREDERICK: Many States doesn't recognize holder claims as a matter of State law, and they have the same kinds of heightened pleading requirements that were imposed under the PSLRA.

JUSTICE BREYER: And, by the way, my concern is not that it's a "bad thing," in quotes. My concern is that it's hard for me to think Congress would have done something that wouldn't have had much effect.

MR. FREDERICK: I think your concern should be,

What did Congress intend? And --

JUSTICE SOUTER: Well, what do you make of --

MR. FREDERICK: And --

JUSTICE BREYER: Right. That's just --

MR. FREDERICK: And I don't think Congress intended to eliminate a swath of class actions concerning a type of claim that this Court had said could not be brought under --

JUSTICE SOUTER: Well, then --

MR. FREDERICK: -- Federal law.

JUSTICE SOUTER: -- what do you make of the legislative history? I mean, your friend on the other side pointed out that there was very clear testimony to the effect that if the statute passed, with the text that we're dealing with, that it would, indeed, cut out a series of claims.

MR. FREDERICK: I don't think that that was -- if you read that in context, I don't think that it was a statement by the speaker, in that instance, of Congress's intent to go beyond those claims that were cognizable under Federal law, and to cut off a whole category of claims that were unique to State law.

JUSTICE STEVENS: Mr. Frederick, you mentioned cutting off a whole category of claims. And, earlier, you said they didn't want to give a pass to this kind of a

claim. But this is not a pass, because there are all sorts of remedies retained -- derivative suits, 49-person actions, and so forth. And are you aware -- you mentioned the 100 years of State precedent -- is there any precedent in the State law for class actions for holder claims?

MR. FREDERICK: Well, we think the Weinberger case recognized that class actions could be brought, under New York law. It was a Federal case --

JUSTICE STEVENS: But this --

MR. FREDERICK: -- but it was --

JUSTICE STEVENS: -- is not a case where we have a 100-year body of law of class action after class action brought on State-law grounds for this type of claim.

MR. FREDERICK: True. But, in the '90s, you had a unique form of fraud that was being perpetrated on Wall Street that did affect holders in a unique way. And we've highlighted market timing in our briefs. In that circumstance, it would be futile for 49 holders to get together and assert that they had been harmed by market timing, because the aggregate of their harm is so small that you really have to look at it in a large context.

John Vogel, the head of Vanguard for many years, and one of most respected mutual-fund advisors, says that there are as many as $5 billion lost by people who buy and hold, as we've been taught to do by Wall Street, but whose

aggregate losses accrete every year by virtue of market timing. That is a unique harm caused to holders, which, under their theory, would not be cognizable, because it would be preempted, and it would be impossible, as a practical matter, for someone to get together with 48 of his or her fellow victims and try to bring a claim to redress that. There's --

JUSTICE STEVENS: But you're --

MR. FREDERICK: -- no evidence --

JUSTICE STEVENS: -- you're describing the present importance of the -- that. But I don't think you've answered my question about historic -- as a matter of history, we don't have a history of timer claims.

MR. FREDERICK: We don't have a history of timer claims, but what we also don't have, Justice Stevens, is an indication by Congress, throughout the entire legislative debate or the conference reports or anything, where holder claims which had been brought were perceived to be a problem and were perceived to be within the ambit of what Congress was doing. Because, remember --

JUSTICE SCALIA: No, because they -- I mean, the argument made by the Government: "Of course not, because the only reason they're brought is precisely to evade this congressional legislation." They didn't exist, before; and they've become common, afterwards. Now -- you know, I

-- you can say --

MR. FREDERICK: They could --

JUSTICE SCALIA: -- that they --

MR. FREDERICK: -- they could not be brought under Federal law, before. And I would acknowledge that, because of a series of this Court's decisions, it is easier to prove a purchaser/seller claim, where the facts warrant that, under 10(b) prior to the PSLRA than it was to prove a holder claim. Judge Friendly, in the Weinberger opinion, makes very clear that the value to be attributed to the class-action settlement there has to be diminished because of the difficulty of proof of such claims. But that --

JUSTICE SCALIA: I thought that there were -- well, never mind.

JUSTICE STEVENS: There would --

MR. FREDERICK: I'd like to address the point that the Government makes about how this would supposedly affect the SEC's enforcement authority --

JUSTICE GINSBURG: Before --

MR. FREDERICK: -- because --

JUSTICE GINSBURG: -- you get to that, just -- Mr. Frederick, the logic of it -- but -- here, Congress is tightening the requirements for class actions, but then there is this class, which -- Blue Chip did say there's a

lot -- room for a lot of abuse in holder classes -- would be left to the State courts for whatever strict or lenient rules. So, why would Congress, with respect to this category, want there to be a more plaintiff-friendly rule than the rule that Congress has just put in place for the purchaser/seller 10(b) actions?

MR. FREDERICK: Justice Ginsburg, I don't think that it's correct to characterize it as more plaintiff-friendly. If you're in Minnesota, you can't bring one of these claims, because State law doesn't recognize it.

JUSTICE GINSBURG: Well, at least in some States.

MR. FREDERICK: In some States, you -- where the common law or the State statutes recognize these claims, all that we're arguing is that Congress didn't focus on these. In the normal presumption against preemption, you don't, you know, cut through a wide swath of claims where Congress hasn't expressed an intent specifically to preempt them. That's our position, and particularly where the congressional findings --

JUSTICE GINSBURG: But you -- you're admitting that an -- that anomaly could be part of the scene, that you'd have a State that allows you to sue for negligence, and doesn't have heightened pleading requirements for holder claims; and so, those claims would be treated more

-- in a more plaintiff-friendly way than Federal claims.

MR. FREDERICK: Yes. Certainly, just as "breach of fiduciary duty" and "breach of the covenant of good faith and fair dealing" are State-law claims, negligence is a State-law claim, all of those give rise to variations, State by State. But what Congress was getting at were fraud claims that were Federal-law fraud claims. And, when it did so, it was heightening the pleading requirements and, seeing what people were doing was taking what were Federal-law claims and migrating them to State court under, ostensibly, more lenient standards --

JUSTICE BREYER: But why, in your theory -- suppose you're right. You're right. I assume that. You can have these holder claims. But why couldn't any buyer, who's -- has to go to Federal court because he has a buyer claim, just say, "I'll bring the holder claim"?

MR. FREDERICK: He can't do that under the --

JUSTICE BREYER: Because?

MR. FREDERICK: -- under the Second Circuit's test, because --

JUSTICE BREYER: I know. But what I'm asking is, What's the logic of that? I mean, you're either right or you're wrong. If Congress didn't want to cut off the holder claim, they didn't. So, what's to show that they wanted to cut it off for some people, but not other

people?

MR. FREDERICK: The logic is that, for the buyers of those claims, they are meeting the Federal standard of "in connection with" --

JUSTICE BREYER: Not in this suit.

MR. FREDERICK: -- "purchase or sale."

JUSTICE BREYER: Not --

MR. FREDERICK: Yes.

JUSTICE BREYER: -- in this suit.

MR. FREDERICK: Yes, they are, because they're buying -- the reason why these people have -- under the Second Circuit's standard, which we think is correct, is that you had to have bought the stock before the fraud, and you were holding it throughout that period of fraud; and so, your purchase is not "in connection with" the fraud, the misrepresentation. But somebody who sees the prospectus, who sees what Mr. Blodget was saying, which was that there were stocks that were, quote, "a piece of crap," but they were giving them the highest buy recommendation -- those people are making their purchase "in connection with" --

JUSTICE BREYER: So, if I'm both --

MR. FREDERICK: -- "a fraud."

JUSTICE BREYER: -- I bought it in May, in reliance on this ridiculous thing. "Buggy whips make

gold." I believed it. I bought buggy whips. Now -- we're now in December. And every month, they kept repeating it. And my claim is, "Yes, I know, I bought it in May, in reliance, but I kept it in July, because I kept seeing it repeated and repeated." Do I --

MR. FREDERICK: I think --

JUSTICE BREYER: -- have a claim?

MR. FREDERICK: I think, actually under the Second Circuit's standard, that --

JUSTICE BREYER: In the Second Circuit, I do not. But I want to know why not.

MR. FREDERICK: Well, I think that the reason why not is that if the fraud is affecting the plaintiff's decision to purchase, then that falls within SLUSA, and that is preempted, although it allow -- you are allowed to have a Federal remedy under that standard. You're rechanneled to Federal court. But if you buy -- to use your hypothetical, you buy in January, but the fraudulent misrepresentations are not made until May or June, you're precluded from bringing a Federal-law claim.

JUSTICE SCALIA: What if I choose not to complain about my buying, I just choose to complain about my holding? It's true, I was harmed because I jumped in. And that's one harm. But it's an entirely separate harm that I was induced to hold it --

MR. FREDERICK: That's --

JUSTICE SCALIA: -- by these continuing misrepresentations. Why can't that part of the suit be brought in State court?

MR. FREDERICK: That's our position.

JUSTICE SCALIA: It is? Okay. So, you --

MR. FREDERICK: Yes. Our position --

JUSTICE SCALIA: -- you --

MR. FREDERICK: -- is that --

JUSTICE SCALIA: -- you agree --

MR. FREDERICK: -- is that --

JUSTICE SCALIA: -- you agree that a buyer --

MR. FREDERICK: I --

JUSTICE SCALIA: -- who -- whose purchase is excluded, can nonetheless sue --

MR. FREDERICK: No, I --

JUSTICE SCALIA: -- in a State --

MR. FREDERICK: No, I'm sorry, I misunderstood your hypothetical. I thought your hypothetical was that if you bought, prior to the fraud --

JUSTICE SCALIA: No, no, no, no. You bought --

MR. FREDERICK: If you bought --

JUSTICE SCALIA: -- in reliance --

MR. FREDERICK: -- in connection with --

JUSTICE SCALIA: -- on the fraud --

MR. FREDERICK: -- a fraud --

JUSTICE SCALIA: Yes.

MR. FREDERICK: -- then you are -- you are -- you are forced into Federal court --

JUSTICE SCALIA: Why?

MR. FREDERICK: -- under SLUSA.

JUSTICE SCALIA: Why? I have --

MR. FREDERICK: Because --

JUSTICE SCALIA: -- a buying claim, and I have a holding claim. Why do --

MR. FREDERICK: That was --

JUSTICE SCALIA: What is there in the statute that says the two have to go with each other?

MR. FREDERICK: That was the decision that Congress made.

JUSTICE SCALIA: Where?

MR. FREDERICK: In this preemption provision --

JUSTICE SCALIA: Well, I'm not making --

MR. FREDERICK: -- that your --

JUSTICE SCALIA: -- a buying claim. I -- and there's nothing in my complaint about my buying the stock. I say --

MR. FREDERICK: Your --

JUSTICE SCALIA: -- "I was induced to hold the stock by these representations that occurred in February,

March, April, and May. I bought, in January, also in reliance on fraud, but I'm not complaining about that."

MR. FREDERICK: What the Second Circuit said, which I think is correct, is that -- is that your damages have to be totally and apart from the fraud as a purchaser, and that where --

JUSTICE SCALIA: But they are --

MR. FREDERICK: -- the reason why they set this timeframe for holder claims is that those kinds of claims that you're talking about, Justice Scalia, would be a classic purchaser/seller-type claim, and you can bring that in Federal court. And that's the point here, that, where you've got long-term holders, and you've got people who purchased in the '80s or in the '70s, and they're being induced to hold for decades, and they may want to make -- they may suffer their damages as a result of collateral that they want to borrow against -- they have no practical means of recovery --

JUSTICE SCALIA: As a practical matter, my damages from the holding may be much greater than my damages from the initial purchase. And you're saying, "Tough luck, Charlie. You bought a month too soon -- or a month too late. You should have brought -- bought before the fraud."

MR. FREDERICK: What the Second Circuit said,

which I think is correct, is that that becomes a level of line-drawing that we don't think Congress did intend to get into.

JUSTICE BREYER: I agree with you. But that's the trouble. Because, in order to make the Second Circuit's argument, you have to say the following, "Congress couldn't have intended to allow people who have a buyer claim to make a totally separate holder claim, because that would gut the statute, and they wouldn't want to engage in a futile act." But now you're asking us to do about the same thing, when you talk about a person who doesn't have the buyer claim and you're trying to get us to say, "Congress thought -- Congress thought an individual action there, their own separate action in the State court, wasn't good enough; it would have wanted to preserve the holder claim for them." Now, that's possible, but it requires me to think Congress is going through quite a few hoops here.

MR. FREDERICK: The hoops that Congress went to, and which I have articulated, in the congressional findings, are that the particular harm that Congress was addressing in SLUSA -- this was a narrow -- you know, this was a narrowly framed preemption as to Federal-law claims, because a -- the PSLRA only governed Federal-law claims. And if you could not bring a holder claim under Federal

law, because of Blue Chip Stamps, you were forced into State court. Okay? So, when Congress is debating the evasion of the PSLRA, it is only talking about Federal-law claims. And there's nothing in the legislative history that they've cited, or that we have found, to suggest that Congress gave any thought to preempting a class of holder claims. Now, certainly --

JUSTICE STEVENS: Mr. Frederick, can I ask sort of a background question? Ever since Blue Chip -- it's been on the books for a long time -- has Congress ever considered legislation that would expand the 10(b)(5) private remedy to include holder claims?

MR. FREDERICK: I'm not aware of legislation, Your Honor.

JUSTICE STEVENS: I'm not, either. I -- just wondering if there was some we could --

MR. FREDERICK: But what -- what this Court did say, in Blue Chip Stamps, was that, when the Birnbaum decision -- and it was an interpretation of "in connection with purchase or sale" by what one Justice on this Court described as the "Mother Court of the Court of Appeals" -- it was Chief Judge Swan, Judge Augustus Hand, and Judge Learned Hand -- and they construed the words "in connection with purchase or sale" to mean the plaintiff's purchase --

JUSTICE STEVENS: Yes, but Blue --

MR. FREDERICK: -- or sale.

JUSTICE STEVENS: -- but Blue Chip did not adopt the rationale of the Birnbaum case.

MR. FREDERICK: Well, I think it -- it did adopt the rule, though, as a basis of the wording. And if you look at page 733 of the Court's opinion, it was adopting the rationale, in the sense that it saw Birnbaum as a construction of the language, and it adopted that. And then in note 5, when Justice Rehnquist's opinion says, "It would be odd to read 'in connection with purchase or sale' to give a," quote, "'cause of action to everybody in the world,'" I think it's clear that that was suggesting that State law could recognize something that this Court said was not recognized under Federal law.

JUSTICE SCALIA: Mr. Frederick, it seems to me that the language "in connection with," you know, whether it means what Blue Chip meant or whether it means what the statute meant, is at least ambiguous. And, if that's the case, why shouldn't we be guided by the Securities and Exchange Commission's determination, under Chevron, Mead, you know, anything but --

MR. FREDERICK: This statute is a -- about private civil actions, and it doesn't affect the SEC's enforcement authority or any action. In fact, the SEC

doesn't derive any greater power, or lesser power, as a result of the enactment of SLUSA. It is entirely legislated against private civil actions.

JUSTICE SCALIA: The --

MR. FREDERICK: So, the SEC --

JUSTICE SCALIA: Have we not given any weight to SEC determinations, as to its interpretation, where civil actions are involved? I'm surprised at that.

MR. FREDERICK: This is an act, Justice Scalia, where the SEC's enforcement authority isn't affected one jot. And so, I think it would be a strange application of Chevron, or even Skidmore, deference to say that the SEC gets some special weight because it's construing words in an enactment --

JUSTICE SCALIA: Yes.

MR. FREDERICK: -- that's addressed to private --

JUSTICE STEVENS: Do you know --

MR. FREDERICK: -- civil litigation.

JUSTICE STEVENS: -- whether the SEC filed an amicus brief in Blue Chip?

MR. FREDERICK: Yes. And it took the position there that "in connection with" did have a broad construction. And that position was rejected.

JUSTICE STEVENS: It took the position that the Seventh Circuit took in Eason, didn't it?

MR. FREDERICK: That's correct.

JUSTICE STEVENS: Yes.

[Laughter.]

MR. FREDERICK: But the Court, there, I don't think was -- it said that it was not in -- giving any deference to the SEC's position, because it was an implied private right of action that this Court had recognized, and that the lower courts had recognized.

JUSTICE GINSBURG: Before you finish -- there's two questions I would like to ask him. One is -- we know about the holder claims. They are saved for State actions. They're not preempted. What else would fall in this category that is not -- that SLUSA doesn't affect, that can be brought as class actions in State court?

MR. FREDERICK: Well, there are class actions that concern breaches of fiduciary duty, negligence. And the question of whether or not they are "in connection with purchase or sale" is going to have a profound impact on whether or not those claims are also preempted. I can't spell out for you what the necessary consequences are, but there are a lot of State-law claims brought under Blue Sky laws and other State remedies that traditionally have been observed and brought, even as State claims, but, under a -- you know, the all-encompassing parameter of "in connection with purchase or sale" advanced on the other

side, a decision that would favor that could have unknown preemptive consequences, which I would submit would be contrary to the normal way you would put Congress to the test of determining, "Did it intend to preempt those claims?" before adopting a broad interpretation that would do so. And if I could point out --

JUSTICE GINSBURG: You --

MR. FREDERICK: -- one of the strange things about this case and the SEC's position is that district courts are going to be put in the rather unusual position of paying a rather high cost, because if they are confronted with a removal of a case brought under State law, where the defendant asserts that it is preempted under SLUSA, and the SEC hasn't taken any action at all, and has expressed no interest in this particular area, the district court, to determine preemption, has to intuit whether or not this is within the SEC's enforcement authority. So, you have -- ordinarily, you would have private plaintiffs suing for wrongdoing on the same side of the case as the SEC, as the public enforcer. But, here, you have them at loggerheads. And the only way that the district court can properly figure that out, whether or not the private victim can get a private remedy, is to cut back on the SEC's enforcement authority, will -- if you will -- would exact an awfully high cost.

I would submit that that kind of an anomaly is a rather unusual one, particularly where the SEC isn't a party in the case, and it is not being invited to submit a brief. And yet, district courts, in order to determine the preemption question here, are going to have to rule against the SEC in order to give a private remedy -- to recognize a private remedy under State law, or to cut back on a remedy under State law by holding that it is within the SEC's enforcement jurisdiction.

Ultimately, what Merrill Lynch here is asserting is an immunity for a fraud that uniquely affects a certain class of holders who do not have a remedy under Federal law. And I would submit that, where any party is seeking to get an immunity from an intentional fraud, the party bears a heavy presumption that that is, in fact, what Congress intended. And I would submit to you that, both with the language of the statute, the findings that Congress made in the legislative history, Congress did not express an intent to eliminate holder class actions of greater than 49 persons.

JUSTICE SCALIA: I agree with that presumption against preemption, where the question is, Does this Federal statute, which says nothing about preemption, accidentally preempt some State law? -- that there, the presumption makes sense. But here, you have a statute,

the whole object of which is preemption. And I'm not sure that what you shouldn't do in that case is just give the language its most reasonable meaning, with no thumb on either side of the scale.

MR. FREDERICK: But it's preemption to rechannel. And that's the important point, Justice Scalia. The point was not to allow State-law claims under State-court systems, but to rechannel those actions into Federal court. And if there are a category of victims of frauds who have no Federal remedy, it doesn't make sense to infer that Congress, without saying so, left those people without any remedy whatsoever.

JUSTICE STEVENS: Mr. Frederick, I want to be sure of one question. I'm not sure I understood your argument about how the district court has to deny the right to the SEC. But the SEC wouldn't be bound by the district court's decision, would it?

MR. FREDERICK: Well, it depends on how the courts would construe the SLUSA cases as affecting the "in connection with purchase or sale" in the SEC enforcement authority. If you were to accept the premise that the Court's Zandford and O'Hagan decisions are binding on the SLUSA preemption language, anytime a court is construing --

May I finish, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Certainly.

MR. FREDERICK: Anytime a court is construing that language, in the SLUSA context, it would necessarily have a collateral impact on the SEC's enforcement authority in 10(b).

JUSTICE STEVENS: Yes, but the SEC could relitigate it, I would think. It wouldn't be bound by the judgment in a private suit.

MR. FREDERICK: It could certainly relitigate it. But the point of the persuasive authority of a construction of "in connection with purchase or sale," I think, would have effects that are inappropriate.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. FREDERICK: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Kasner, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JAY B. KASNER

ON BEHALF OF PETITIONER

MR. KASNER: Counsel referred to the findings in the legislation. And I know this Court will go back and review those. The -- finding number 5 does not use the word "certain" anywhere in it. What finding number 5 does say, however, "It is appropriate to enact national standards for securities class-action lawsuits involving nationally traded securities while preserving the appropriate enforcement powers of State securities

regulators and not changing the current treatment of individual lawsuits," quote/unquote.

Justice Breyer and Justice Ginsburg asked questions that I think illustrate that Congress could not have intended such an anomalous result by allowing holders' claims to proceed as nonpreempted.

Justice Breyer, as a practical matter, you are 100 percent right in the premise of your question. If this Court agrees with -- that the court below is correct, every single securities class action that is brought in Federal court from that day forward will have a companion claim brought with it, asserted by holders. And it's not simply holders in the fashion that Mr. Dabit appears, which is somebody who claims, "I would have sold, had I, essentially, known inside information," a proposition which Judge Friendly expounded on in the Levine case in the Second Circuit, but you will also have holders -- you will also have claims by people who come to court, in the State court, and say, "You know, I would have bought securities if you had not issued such unduly pessimistic projections," just as was the case in the Blue Chip Stamp case. And imagine the impact that that result would have on the safe harbor, which Congress enacted with the PSLRA to protect public companies in the United States and abroad, encouraging them to make forward-looking

statements. If you allow a result which affords putative people, who would have bought and would have sold, in State court where the safe harbor doesn't apply, you will absolutely be gutting the statutory protections that Congress was seeking to protect.

I'd like to just make one point about the Weinberger verse -- the Weinberger v. Kendrick case that is mentioned. That involved an approval of a Federal-court class action where State-law holders' claims were being released. In fact, the consideration that was approved there was less, because the claims were weaker.

We've heard a lot, Your Honors, about why Congress didn't mention holders' claims by name. The reason they didn't mention holders' claims by name is that it wasn't until SLUSA was enacted and creative plaintiff strike-suit lawyers brought holders' claims, in an effort to avoid SLUSA, that this problem became exacerbated. But there is no doubt that the plain and natural meaning of SLUSA picks up all claims by any private party in connection with the purchase or sale of security.

If there are no --

JUSTICE STEVENS: It's surprising that the holder claims didn't respond to Blue Chip. I think your argument would suggest they should have responded to Blue Chip by bringing a whole host of holder claims in the

State court.

MR. KASNER: Yes, Your Honor.

JUSTICE STEVENS: Yes.

MR. KASNER: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

[Whereupon, at 12:16 p.m., the case in the above-entitled matter was submitted.]