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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.

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

6 Mr. Kasner.

7 ORAL ARGUMENT OF JAY B. KASNER

8 ON BEHALF OF PETITIONER

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

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

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

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

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

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

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

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

21 JUSTICE STEVENS: May I just ask you this
22 question about the plain language? If the word in
23 1(f)(1)(A) had not been "in connection with the purchase
24 of sale -- sale of security," had been "in connection with
25 his or her purchase or sale," then it would have been

1 covered, would it not?

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

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

8 MR. KASNER: In essence, Justice Stevens --

9 JUSTICE STEVENS: Is that true?

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

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

21 MR. KASNER: It does, Justice Scalia.

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

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

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

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

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

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

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

21 [Laughter.]

22 JUSTICE SCALIA: I mean, that's --

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

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

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

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

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

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

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

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

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

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

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

10 We also --

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

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

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

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

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

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

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

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

21 JUSTICE STEVENS: It just preempts class
22 actions.

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

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

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

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

13 MR. KASNER: Justice Stevens, the --

14 JUSTICE STEVENS: Other than the language of the
15 statute?

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

17 JUSTICE STEVENS: Yes.

18 MR. KASNER: -- this inquiry --

19 JUSTICE STEVENS: But you --

20 MR. KASNER: -- begins and ends --

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

23 MR. KASNER: Yes.

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

1 [Laughter.]

2 JUSTICE STEVENS: Yes.

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

11 But back for a moment, though, to the issue of
12 what is not preempted in the policy behind this statute,
13 there was another component that Congress was seeking to
14 remedy here, and that was the so-called "safe harbor." In
15 1995, when Congress enacted the Private Securities
16 Litigation Reform Act, one piece of that was an effort to
17 encourage public companies to make predictive statements
18 publicly. There had been a rash of litigation, at the
19 time, against public companies whose predictive statements
20 proved false. And so, Congress said, "Wait a minute. We
21 will allow you an insulation from liability, if your
22 forward statements prove false, if the plaintiff cannot
23 allege either that they were made with actual knowledge or
24 not accompanied by meaningful cautionary language."

25 Another purpose of this statute was to --

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

2 MR. KASNER: Yes.

3 JUSTICE SOUTER: -- your time is running out.

4 MR. KASNER: Yes.

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

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

10 JUSTICE SOUTER: Okay.

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

12 JUSTICE SOUTER: So --

13 MR. KASNER: The definition --

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kasner.

21 Mr. Hungar.

22 ORAL ARGUMENT OF THOMAS G. HUNGAR

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONER

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

1 may it please the Court:

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

8 The Securities and Exchange Commission --

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

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

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

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

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

3 [Laughter.]

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

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

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

9 CHIEF JUSTICE ROBERTS: No, but you --

10 MR. HUNGAR: -- if it --

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

12 MR. HUNGAR: I'm sorry?

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

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

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

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

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

7 JUSTICE STEVENS: Yes.

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

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

22 JUSTICE STEVENS: Right.

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

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

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

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

16 JUSTICE GINSBURG: What about the --

17 MR. HUNGAR: Congress was --

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

23 MR. HUNGAR: Your --

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

1 advice."

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

4 JUSTICE GINSBURG: I know, but I --

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

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

9 MR. HUNGAR: The --

10 JUSTICE GINSBURG: -- even as a class action?

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

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

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

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

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

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

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

1 suggestion that Congress would have intended that result.

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.
2 Mr. Frederick.

3 ORAL ARGUMENT OF DAVID C. FREDERICK
4 ON BEHALF OF RESPONDENT

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

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

16 If I could start with the text --

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

19 MR. FREDERICK: No, because this Court, in the
20 Blue Chip Stamps case, said that it did not. In footnote
21 5, Justice Rehnquist --

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

24 MR. FREDERICK: In enforcement --

25 JUSTICE KENNEDY: -- SEC?

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

6 JUSTICE KENNEDY: But then, the --

7 MR. FREDERICK: -- jurisdiction.

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

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

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

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

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

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

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

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

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

1 MR. FREDERICK: Absolutely --

2 JUSTICE SCALIA: And why --

3 MR. FREDERICK: -- not.

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

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

20 CHIEF JUSTICE ROBERTS: But the --

21 MR. FREDERICK: -- induces you.

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

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

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

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

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

1 JUSTICE BREYER: In that --

2 MR. FREDERICK: In --

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

10 MR. FREDERICK: No.

11 JUSTICE BREYER: No.

12 MR. FREDERICK: Blue Chip --

13 JUSTICE BREYER: Okay.

14 MR. FREDERICK: -- Stamps said no.

15 JUSTICE BREYER: Yes.

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

21 JUSTICE BREYER: All right, then --

22 MR. FREDERICK: -- class action --

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

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

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

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

20 MR. FREDERICK: -- that are indirect purchasers.

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

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

6 MR. FREDERICK: Well --

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

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

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

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

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

25 MR. FREDERICK: I think your concern should be,

1 What did Congress intend? And --

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

3 MR. FREDERICK: And --

4 JUSTICE BREYER: Right. That's just --

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

9 JUSTICE SOUTER: Well, then --

10 MR. FREDERICK: -- Federal law.

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

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

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

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

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

9 JUSTICE STEVENS: But this --

10 MR. FREDERICK: -- but it was --

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

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

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

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

8 JUSTICE STEVENS: But you're --

9 MR. FREDERICK: -- no evidence --

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

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

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

1 -- you can say --

2 MR. FREDERICK: They could --

3 JUSTICE SCALIA: -- that they --

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

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

16 JUSTICE STEVENS: There would --

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

20 JUSTICE GINSBURG: Before --

21 MR. FREDERICK: -- because --

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

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

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

11 JUSTICE GINSBURG: Well, at least in some
12 States.

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

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

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

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

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

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

18 JUSTICE BREYER: Because?

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

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

1 people?

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

5 JUSTICE BREYER: Not in this suit.

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

7 JUSTICE BREYER: Not --

8 MR. FREDERICK: Yes.

9 JUSTICE BREYER: -- in this suit.

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

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

23 MR. FREDERICK: -- "a fraud."

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

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

6 MR. FREDERICK: I think --

7 JUSTICE BREYER: -- have a claim?

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

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

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

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

1 MR. FREDERICK: That's --

2 JUSTICE SCALIA: -- by these continuing

3 misrepresentations. Why can't that part of the suit be

4 brought in State court?

5 MR. FREDERICK: That's our position.

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

7 MR. FREDERICK: Yes. Our position --

8 JUSTICE SCALIA: -- you --

9 MR. FREDERICK: -- is that --

10 JUSTICE SCALIA: -- you agree --

11 MR. FREDERICK: -- is that --

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

13 MR. FREDERICK: I --

14 JUSTICE SCALIA: -- who -- whose purchase is

15 excluded, can nonetheless sue --

16 MR. FREDERICK: No, I --

17 JUSTICE SCALIA: -- in a State --

18 MR. FREDERICK: No, I'm sorry, I misunderstood

19 your hypothetical. I thought your hypothetical was that

20 if you bought, prior to the fraud --

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

22 MR. FREDERICK: If you bought --

23 JUSTICE SCALIA: -- in reliance --

24 MR. FREDERICK: -- in connection with --

25 JUSTICE SCALIA: -- on the fraud --

1 MR. FREDERICK: -- a fraud --

2 JUSTICE SCALIA: Yes.

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

5 JUSTICE SCALIA: Why?

6 MR. FREDERICK: -- under SLUSA.

7 JUSTICE SCALIA: Why? I have --

8 MR. FREDERICK: Because --

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

11 MR. FREDERICK: That was --

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

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

16 JUSTICE SCALIA: Where?

17 MR. FREDERICK: In this preemption provision --

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

19 MR. FREDERICK: -- that your --

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

23 MR. FREDERICK: Your --

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

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

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

7 JUSTICE SCALIA: But they are --

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

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

25 MR. FREDERICK: What the Second Circuit said,

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

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

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

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

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

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

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

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

1 JUSTICE STEVENS: Yes, but Blue --

2 MR. FREDERICK: -- or sale.

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

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

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

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

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

4 JUSTICE SCALIA: The --

5 MR. FREDERICK: So, the SEC --

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

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

15 JUSTICE SCALIA: Yes.

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

17 JUSTICE STEVENS: Do you know --

18 MR. FREDERICK: -- civil litigation.

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

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

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

1 MR. FREDERICK: That's correct.

2 JUSTICE STEVENS: Yes.

3 [Laughter.]

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

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

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

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

7 JUSTICE GINSBURG: You --

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

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

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

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

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

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

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

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

24 May I finish, Mr. Chief Justice?

25 CHIEF JUSTICE ROBERTS: Certainly.

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

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

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

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

13 MR. FREDERICK: Thank you.

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

16 REBUTTAL ARGUMENT OF JAY B. KASNER

17 ON BEHALF OF PETITIONER

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

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

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

7 Justice Breyer, as a practical matter, you are
8 100 percent right in the premise of your question. If
9 this Court agrees with -- that the court below is correct,
10 every single securities class action that is brought in
11 Federal court from that day forward will have a companion
12 claim brought with it, asserted by holders. And it's not
13 simply holders in the fashion that Mr. Dabit appears,
14 which is somebody who claims, "I would have sold, had I,
15 essentially, known inside information," a proposition
16 which Judge Friendly expounded on in the Levine case in
17 the Second Circuit, but you will also have holders -- you
18 will also have claims by people who come to court, in the
19 State court, and say, "You know, I would have bought
20 securities if you had not issued such unduly pessimistic
21 projections," just as was the case in the Blue Chip Stamp
22 case. And imagine the impact that that result would have
23 on the safe harbor, which Congress enacted with the PSLRA
24 to protect public companies in the United States and
25 abroad, encouraging them to make forward-looking

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

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

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

21 If there are no --

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

1 State court.

2 MR. KASNER: Yes, Your Honor.

3 JUSTICE STEVENS: Yes.

4 MR. KASNER: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

6 The case is submitted.

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

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