No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC. *et al.*,

Petitioner,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND *et al.*,

Respondents.

On Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

BRIEF FOR RESPONDENTS

Andrew S. Love
John K. Grant
ROBBINS GELLER
RUDMAN & DOWD LLP
Post Montgomery Center
One Montgomery Street
Suite 1800
San Francisco, CA 94104

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
202.362.0636
tg@goldsteinrussell.com

Additional Counsel on Inside Cover

Robert V. Prongay
Ex Kano S. Sams II
GLANCY PRONGAY &
MURRAY LLP
1925 Century Park East
Suite 2100
Los Angeles, CA 90067

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF FOR RESPONDENTS

Respondents Beaver County Employees Retirement Fund et al. respectfully request that this Court affirm the decision below.

STATEMENT OF THE CASE

Petitioners are Cyan, Inc., a computer hardware and software company, as well as some of its officers and directors. Respondents are three pension funds and an individual who bought shares in Cyan's initial public offering.

On behalf of a class of investors, respondents sued petitioners under the Securities Act of 1933 (Securities Act), ch. 38, 48 Stat. 74, *codified at* 15 U.S.C. §§ 77a *et seq*. The precise factual allegations do not matter for purposes of the Question Presented in this Court. Broadly, respondents allege that Cyan's offering documents misrepresented the company's customer base and likely future sales. J.A. 19-20, 22-24. The truth later became apparent, causing the stock to lose more than half its value. J.A. 27. Respondents do not allege that petitioners' misstatements were fraudulent.

The important points for present purposes are that respondents brought a class action suit in California state court, asserting only claims under the uniform standards established by the Securities Act. *See* J.A. 13, 30-33. Petitioners moved for judgment on the pleadings. They argue that the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, eliminated state courts' jurisdiction over such larger class actions that assert claims only under the Securities Act.

Congress enacted SLUSA to prevent evasion of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, which imposed restrictions on federal securities class action suits. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). The PSLRA implemented certain procedural reforms in federal courts (*e.g.*, a requirement to appoint a lead plaintiff), and certain other substantive changes (*e.g.*, the creation of a safe harbor for forward-looking statements) that apply in every private securities action, regardless of forum. *See, e.g.*, 15 U.S.C. § 77z-2. It also imposed additional restrictions on suits brought under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, including heightened pleading standards. *See* 15 U.S.C. § 78u-4(b)(1), (2).

In the wake of the PSLRA, some plaintiffs—like respondents here—continued to seek relief under federal law, as amended by the PSLRA. Some other plaintiffs, however, sought to avoid the PSLRA's restrictions by pleading their claims under state, rather than federal, law. In particular, certain securities fraud suits that previously would have been litigated under the Exchange Act in the federal courts—which have "exclusive jurisdiction" over such actions, 15 U.S.C. § 78aa(a)—were instead brought in state court under parallel provisions of state law. Congress recognized that such actions asserting violations of state law with respect to nationally traded securities had been exceedingly rare before the PSLRA. *See Dabit*, 547 U.S. at 82.

Congress responded by enacting SLUSA. SLUSA's "core provision," *id.*—Section 77p—has two

operative subsections, both targeted at this specific evasion of the PSLRA:

> Subsection (b) forbids any class action with at least 50 plaintiffs (a "covered class action") that includes a state law claim of misstatements or fraud in connection with the purchase or sale of a security traded on a national exchange (a "covered security").
>
> Subsection (c) provides that a covered class action in state court that includes a state law claim specified by subsection (b) may be removed to federal court, where it will be subject to subsection (b).

See 15 U.S.C. § 77p(b), (c); *see also id.* § 78bb (parallel amendment to the Exchange Act discussed in *Dabit*, which is substantively identical); *infra* at 1a-6a (reproducing Section 77p in full). Several provisions narrow Section 77p to preserve the power of state courts to decide various securities class actions and the authority of state officials.[1]

Section 77p applies to any (non-exempt) covered class action that includes a state law claim prohibited by subsection (b). That prohibition applies as well when the suit asserts both a state law claim and a federal claim under the Securities Act. The parties call such a combined action a "mixed" case. *E.g.*, Pet. Br. 17.

---

[1] *See* § 77p(b)(2) (excluding smaller class actions and litigation over securities not traded on national exchanges), (d)(1) (excluding suits that are based on the law of the state of the defendant's incorporation), (d)(2) (excluding actions by state entities), (d)(3) (excluding actions to enforce an agreement with an indenture trustee), (f)(2)(B) (excluding derivative actions).

Petitioners accept that Section 77p does not preclude respondents' complaint, because respondents do not assert a claim under state law. Nor do petitioners contend that respondents' suit otherwise directly implicates Congress's concerns with efforts to evade the PSLRA's restrictions on federal class action litigation.

Petitioners instead rely on the Securities Act's jurisdictional provision—Section 77v(a)—which SLUSA modified in "conforming amendments." SLUSA § 101 (capitalization altered). Section 77v(a) states in relevant part, with the language added by SLUSA emphasized and with ellipses omitted for clarity:

> The district courts shall have jurisdiction, concurrent with State courts, except as provided in section 77p of this title with respect to covered class actions, of actions to enforce any liability created by this subchapter. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. § 77v(a); *see also infra* at 7a-8a (reproducing Section 77v(a) in full).

Petitioners argue that these amendments eliminate state courts' jurisdiction over all covered class actions that assert only claims under the Securities Act. *See* Pet. Br. 19. As discussed, however, the cross-referenced "section 77p" does not actually regulate suits brought exclusively under the Securities Act (or, for that matter, any federal law).

Petitioners argue that, notwithstanding the statutory text, their interpretation is nonetheless sound if one reads Section 77v(a)'s reference to "section 77p" to incorporate just one of Section 77p's sub-sub-provisions: Section 77p(f)(2), which "[f]or purposes of" Section 77p defines a "covered class action" as a suit on behalf of 50 or more plaintiffs. 15 U.S.C. § 77p(f)(2). Petitioners thus construe the phrase "except as provided in section 77p of this title with respect to covered class actions" to mean "except with respect to covered class actions as defined in section 77p(f)(2) of this title." On that reading, because respondents' suit is a covered class action, SLUSA strips the state courts of concurrent jurisdiction to hear it.

By contrast, respondents read the "conforming amendments" to Section 77v(a) to harmonize that provision with Section 77p's limitation on state courts' power to hear cases. Thus, Section 77v(a) strips state courts of jurisdiction over mixed cases—*i.e.*, covered class actions that simultaneously are "brought to enforce any liability or duty under" the Securities Act, 15 U.S.C. § 77v(a), and also are precluded by Section 77p because they advance a prohibited state law claim. Because respondents' action is not in any respect covered by Section 77p, that section does not "provide" any exception for the state courts' jurisdiction over it.

The overwhelming majority of federal and state courts agree with respondents that state courts have jurisdiction over covered class actions that assert claims only under the Securities Act. *See* BIO 12-13 n.3 (collecting cases). So did the Superior Court in this case, which denied petitioners' motion for judgment on the pleadings. Pet. App. 1a, 6a. The California Court

of Appeal and Supreme Court of California both denied interlocutory review. *Id.* 15a-16a. This Court called for the views of the Solicitor General, who agreed with respondents' reading but urged the Court to hear the case because some trial courts had issued conflicting rulings and the issue could evade appellate review. CVSG Br. 6. The Court granted certiorari. 137 S. Ct. 2325 (2017).

SUMMARY OF ARGUMENT

The state courts correctly concluded that they have jurisdiction over respondents' suit, which asserts only claims under the Securities Act. State courts have had concurrent jurisdiction to decide such cases since the statute was enacted almost 85 years ago in the wake of the country's greatest financial catastrophes. Nothing Congress did in the PSLRA or in SLUSA altered that well-settled understanding—let alone with sufficient clarity to strip state courts of jurisdiction to hear every single covered class action under the Securities Act.

SLUSA's conforming amendments to Section 77v(a)'s jurisdictional provision serve an important but narrow function: they abridge state court jurisdiction over "mixed" cases—*i.e.*, covered class action lawsuits asserting claims that are prohibited by Section 77p together with a claim under the Securities Act. The amendments thereby prevent plaintiffs from circumventing Section 77p by tacking Securities Act claims onto their prohibited state law claims to avoid dismissal.

That interpretation of the statute is the only one supported by the text of Section 77v(a), which provides that state courts shall have concurrent jurisdiction

over Securities Act cases, "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). Congress used the word "provided," meaning that the relevant limitation will be supplied by the operative provisions of Section 77p. This usage accords with the ordinary meaning of "provided," and with the way it is commonly used in the U.S. Code. Significantly, Congress used "provided" instead of "defined," which would signal the intent only to incorporate a definition of "covered class actions."

Congress also cross-referenced "section 77p of this title" in its entirety. It did not single out the sub-sub-section that petitioners argue was incorporated alone—*i.e.*, the definition of a "covered class action" in Section 77p(f)(2). A reference to Section 77p most naturally refers to what this Court has described as its "core provision," *i.e.*, the substantive limitation on covered class actions—as informed, of course, by the exclusions and definitions also located in Section 77p.

Respondents' interpretation is also the only one that truly harmonizes Section 77v(a) with Section 77p. Under respondents' interpretation, the conforming amendments to Section 77v(a) serve as a useful adjunct to Section 77p's core provision: they prevent Section 77v(a)'s grant of jurisdiction and removal bar from creating an end run around Section 77p. And they incorporate all of the operative provisions and limitations that Congress carefully incorporated into Section 77p.

Petitioners' interpretation, on the other hand, holds that Section 77v(a)'s amendments borrow a definition from Section 77p and ignore the rest of it. According to petitioners, Section 77v(a) then goes on

to target an entirely different set of cases than Section 77p: while SLUSA's core provision targets *only* state law cases, Section 77v(a)'s jurisdictional provision targets *only* covered class actions under the Securities Act. It does so whether those cases involve "covered securities" or not, and whether they allege fraud or deception or not. Petitioners' interpretation also reads the statute to shift cases from state to federal court, whereas Section 77p mandates the dismissal of the suits it targets.

That is not the way to harmonize two statutory provisions. Indeed, it makes no sense for a conforming amendment—designed to make Section 77v(a) conform to Section 77p—to instead implement an entirely different agenda.

For much the same reason, respondents' interpretation is the only one that reflects SLUSA's purpose. This Court has examined SLUSA repeatedly, and each time recognized that the statute was carefully drawn to target the most troublesome state law cases while simultaneously preserving the power of state courts and governments to address other cases—including cases that do not involve covered securities. Respondents' reading serves that purpose by making sure that SLUSA's core prohibition remains effective—even if a plaintiff in a mixed covered class action also raises a claim under the Securities Act. Petitioners' interpretation, by contrast, serves an entirely different purpose—of shunting Securities Act claims into federal court—that petitioners simply invented. Indeed, none of the snippets of legislative history petitioners cite even suggest that Congress was interested in moving *all* covered class actions under the Securities Act (even

those that do not involve a covered security, or allege the sort of misconduct described in Section 77p) into federal court; to the contrary, the most authoritative sources of legislative history are explicit that SLUSA's purpose was to bar claims under state law alleging falsehoods or fraud, and that it was not intended to affect cases that do not involve nationally traded securities.

Finally, the Solicitor General's theory, advanced at the certiorari stage, that SLUSA authorizes the removal of cases like respondents', is also incorrect. The plain text of SLUSA's removal provision only applies to covered class actions involving a covered security "as set forth in subsection (b)." 15 U.S.C. § 77p(c). Subsection (b), in turn, applies only to covered class actions "based upon the statutory or common law of any State or subdivision thereof," which allege falsehoods or fraud. 15 U.S.C. § 77p(b). The Solicitor General inexplicably argues that the Court can simply ignore the quoted language limiting SLUSA to cases based on state law. That simply is not how statutory interpretation works. Moreover, this Court rejected precisely that argument in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 (2006), in which it adopted the "straightforward reading" that "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." The Solicitor General's efforts to distinguish that precedent are unavailing.

For these reasons, the judgment of the California Court of Appeal should be affirmed.

ARGUMENT

Pursuant to SLUSA's "conforming amendments" to Section 77v(a), state courts have concurrent jurisdiction over a lawsuit asserting a Securities Act claim, "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). Respondents read the amendment naturally to restrict state courts' jurisdiction over the covered class actions that are proscribed by Section 77p—*i.e.*, mixed cases that assert prohibited state law claims in connection with the purchase or sale of covered securities, combined with a Securities Act claim.

By contrast, petitioners unnaturally read the amendment to permit only federal courts, not state courts, to adjudicate all covered class actions that *only* assert claims under the Securities Act. They press that interpretation notwithstanding that Section 77p does not regulate those suits, that it does not reach all "covered class actions," and that it provides for the dismissal of the cases it covers rather than shifting them to be litigated in federal court.

Respondents' reading is much better. Even if both interpretations are possible, the tie-breaker is the rule of statutory construction that Congress makes substantial changes to settled law clearly, not obliquely and misleadingly.[2] That is especially true if

---

[2] *See, e.g.*, *United States v. Cook*, 384 U.S. 257, 262 (1966) (rejecting a statutory interpretation that would significantly alter the scope of persons affected "without some specific indication that Congress had receded from the intention it clearly expressed"); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in

Congress intends to change the federal-state balance by stripping state courts of their established jurisdiction over federal claims.[3] State courts have had concurrent jurisdiction over suits asserting claims exclusively under the Securities Act ever since Congress enacted the statute in 1933. *See* Pet. Br. 14. If Congress intended to depart from that tradition, which had been settled for more than six decades when SLUSA was enacted, it would have said so plainly.

I. SLUSA Does Not Strip State Courts Of Concurrent Jurisdiction Over Class Actions That Only Advance Claims Under The Securities Act.

SLUSA enacted the preclusion and removal provisions of Section 77p, together with "conforming

---

revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed"); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (same).

[3] *See, e.g.*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) ("The presumption of concurrent state-court jurisdiction . . . can be overcome 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'") (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)); *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 259 (1992) ("There is every reason to expect Congress to take great care in its use of explicit language when it wishes to confer exclusive jurisdiction, given our longstanding requirement to that effect."); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (explaining that this Court's decisions "reflect a deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes," and explaining that this "reluctance . . . grows stronger" when "a statute . . . depriv[es] state courts of all ability to adjudicate certain claims").

amendments" to Section 77v(a). SLUSA § 101. Properly understood, the point of those amendments was to eliminate a potential conflict between Sections 77p and Section 77v(a). Section 77p, as explained above, prohibits courts from adjudicating certain covered class actions that are "based upon" the law of any state, and authorizes the removal of those actions from state court. 15 U.S.C. § 77p(b), (c). Section 77v(a), on the other hand, confirmed that state courts had concurrent jurisdiction over cases "brought to enforce any liability or duty created by" the Securities Act, and prohibited the removal of those cases from state courts of competent jurisdiction. 15 U.S.C. § 77v(a).

These two provisions would have been at war with each other if a plaintiff filed a "mixed" covered class action asserting claims that were based upon state law, and also claims under the Securities Act. Section 77p would have required preclusion and permitted removal of the action; Section 77v(a) would have expressly confirmed the state court's jurisdiction to hear the case and would have prohibited removal.

This scenario would have created at least the possibility that plaintiffs would have attempted to circumvent SLUSA by tacking Securities Act claims onto their prohibited state law class actions. Indeed, these mixed cases have been brought regularly,[4] and

---

[4] *See, e.g.*, *Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 931 (11th Cir. 1997); *Shorty v. Top Rank of La.*, 876 F. Supp. 838, 839 (E.D. La. 1995); *Westinghouse Credit Corp. v. Thompson*, 987 F.2d 682, 683 (10th Cir. 1993); *Peoples Nat'l Bank v. Darling*, No. 91-1052-K, 1991 WL 45716, at *1 (D. Kan. Apr. 1, 1991); *West Virginia v. Morgan Stanley & Co., Inc.*, 747 F. Supp. 332, 333 (1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190,

they could have become much more common if SLUSA did not clearly exclude them from the jurisdiction of the state courts and subject them to removal.

SLUSA prevented that circumvention by modifying Section 77v(a) using conforming amendments that harmonize the jurisdictional provision with Section 77p. The amendments narrow both the state courts' jurisdiction and the parallel removal bar by excluding cases that are prohibited by Section 77p.

This interpretation maps naturally onto the language Congress used. Congress excluded mixed covered class actions by providing that state courts have jurisdiction over Securities Act cases "except as provided in section 77p of this title with respect to covered class actions." 15 U.S.C. § 77v(a). That is common statutory phrasing. Congress regularly uses language akin to "except as provided in [*a statutory section*] with respect to [*a specified subject matter*]." Those statutes consistently incorporate a substantive limitation from the cross-referenced statutory provision.[5]

1193 (9th Cir. 1988); *Abing v. Paine, Webber, Jackson & Curtis*, 538 F. Supp. 1193, 1195 (D. Minn. 1982); *Milton R. Barrie Co., Inc. v. Levine*, 390 F. Supp. 475, 477 (S.D.N.Y. 1975); *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 166 (S.D.N.Y. 1971); *Korber v. Lehman*, 221 F. Supp. 358, 359 (S.D.N.Y. 1963).

[5] *See, e.g.*, 15 U.S.C. § 78c-1(3) ("Except as provided in section 78p(a) of this title with respect to reporting requirements, the Commission is prohibited from" regulating swap agreements.); 23 U.S.C. § 301 ("Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels," highways shall be free of tolls.); 26 U.S.C. § 6807 (providing that

Section 77v(a) and those other statutes use the most commonly accepted definition of "provided": "supplied."[6] Here, the amendment to Section 77v(a) directs the reader to Section 77p, which will supply a self-operative limit on state courts' ability to adjudicate Securities Act suits. Congress incorporated *all* of Section 77p because several parts of Section 77p are relevant, including subsection (b)'s prohibition on certain covered class actions, the statute's various exclusions that preserve state court jurisdiction in some cases, and the definitions of the statutory terms. *See supra* at 3 n.1.

Respondents' suit is not precluded by Section 77p, because it does not assert a claim under state law. It therefore is subject to the state courts' jurisdiction under Section 77v(a).

---

seized goods will receive required brands, stamps, or marks prior to sale, "except as provided in section 5688 with respect to distilled spirits"); 36 U.S.C. § 220521(a) (providing that the United States Olympic Committee "may recognize only one national governing body for each sport for which an application is made and approved, except as provided in section 220522(b) with respect to a paralympic sports organization"); 42 U.S.C. § 10194(c) (providing that the Secretary of Energy's research activities relating to the identification of nuclear waste sites are subject to certain restrictions "[e]xcept as provided in section 10198 of this title with respect to a test and evaluation facility"). In all of these provisions, the referenced sections do not define the respective terms of art but instead lay out self-contained substantive requirements.

[6] *See, e.g.*, Merriam-Webster's Collegiate Dictionary (10th ed. 2001) (defining "provide" as "to supply something for sustenance or support"); Webster's II: New College Dictionary (1995) (defining "provide" as "To furnish: supply").

II. There Is No Merit To Petitioners' Interpretation Of Section 77v(a).

A. Petitioners' Reading Cannot Be Reconciled With The Statutory Text.

Petitioners' contrary reading of Section 77v(a) is not supportable. They rely on the fact that one of Section 77p's several sub-sub-sections ((f)(2)) defines "covered class action" as a suit or group of suits with 50 or more plaintiffs. The definition does not require that the suit assert a state law claim involving a covered security.

Petitioners' reading requires substantially reordering the words of the amendment to Section 77v(a) and reading "provided" to mean "defined"—*i.e.*, that the language that follows ("in section 77p") explains the meaning of a term of art. But "defined" is not an accepted usage of "provide." Petitioners do not identify any dictionary recognizing it. Nor do they identify any other statute using the phrase "as provided in" that way. When the securities laws intend to incorporate a definition they consistently use familiar formulations like "as defined in."[7] Moreover, petitioners' assertion that SLUSA incorporates this definition into Section 77v(a) also fails because SLUSA specifies that the definition of "covered class action" applies only "[f]or purposes of" Section 77p. *See* 15 U.S.C. § 77p(f).

---

[7] *See, e.g.*, 15 U.S.C. § 77b-1(b)(1) (excluding from the definition of a "security" any "security-based swap agreement (as defined in section 78c(a)(78) of this title"); 15 U.S.C. §§ 77b(a)(15)(i), 77c(a)(2), 77d-1(a)(1)(B), 77r-1(a)(1)(C), 77s(e) (all calling out definitions in other statutory sections using the phrase "as defined in").

Petitioners also have no sound explanation for why Congress incorporated "section 77p" as a whole, if it actually intended to refer only to the isolated definition of "covered class action" in subsection 77p(f)(2). Petitioners' sole argument is that one feature of "section 77p" is that it includes "a definition of a 'covered class action.'" Pet. Br. 16. But that definition is ancillary to Section 77p as a whole. In referencing what Section 77p "provides," Congress is much, much more likely to have had in mind SLUSA's "core" operative provision: the bar to "covered class actions" that include a state law claim.

If Congress actually intended petitioners' reading, it would have used a common and clear formulation, such as: "except with respect to covered class actions as defined in section 77p(f)(2)." Or consistent with the Exchange Act, Congress would have granted federal courts "exclusive jurisdiction" over those suits. *See* 15 U.S.C. § 78aa(a).

Any remaining doubt is resolved against petitioners' reading by SLUSA's other "conforming amendment" to Section 77v(a), which narrowed the removal bar. That provision is particularly informative because there is a strong presumption that words have a consistent meaning when used multiple times in a statute. That presumption is at its apex when the words appear in close proximity and were adopted together.[8] As amended by SLUSA, that

---

[8] *See, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words

provision states: "Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a).

Without a doubt, this provision uses "provided" to mean "supplied," because it incorporates the substantive limits on removal imposed by Section 77p(c). It does not incorporate a definition. The amendment furthermore references only a single subsection of Section 77p, just as Congress would have done if it intended the jurisdictional provision to incorporate only Section 77p(f)(2)'s definition of "covered class action." Petitioners identify no reason that Congress would have intended the same adjoining phrasing, adopted together, to have such a radically different meaning.

B. Petitioners' Interpretation Cannot Be Reconciled With Section 77p.

1. The parties agree that Congress amended Section 77v(a) to "harmonize" that provision with Section 77p. *See* Pet. Br. 35. But only respondents' reading does so. As discussed, properly understood, the amendment eliminates the state courts' jurisdiction, and permits removal, for "mixed cases" that combine a Securities Act claim that would otherwise be within the state courts' jurisdiction under Section 77v(a) with a claim prohibited by Section 77p. The amendment thus ensures that SLUSA fulfills its purpose of precluding *all* covered

---

used in different parts of the same act are intended to have the same meaning.") (citations and quotations omitted); *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (same).

class actions asserting a prohibited claim—*i.e.*, a state law claim alleging misstatements or fraud in connection with a nationally traded security.

Petitioners, by contrast, read the amendment to eliminate state court jurisdiction over covered class actions arising solely under the Securities Act. Pet. Br. 10. On that reading, the amendment to Section 77v(a) functions very differently than as a harmonious adjunct to Section 77p. It would apply only to federal law claims that Section 77p does not regulate at all. It also would apply to *all* covered class actions, whereas Section 77p is substantially narrower. And it would shift the cases in question to federal court, while Section 77p requires the dismissal of cases it covers.

Thus, according to petitioners, the amendment incorporates only the definition of "covered class action," while leaving all of the other limitations of Section 77p by the wayside. Petitioners concede that their interpretation of the statute would strip state courts of jurisdiction over cases that do not involve "covered securities" and do not include claims of misstatements or fraud in the purchase or sale of those securities. Pet. Br. 29; *see, e.g.*, 15 U.S.C. §§ 77e, 77*l*(a)(1) (Section 12 claim with respect to securities that are not registered and therefore are not "covered securities"). Petitioners would require all covered class actions asserting a Securities Act claim—many of which implicate neither national securities markets nor the types of claims that motivated Congress to enact SLUSA—to be brought in federal court.

Relatedly, petitioners also read the amendments to Section 77v(a) to perform a very different function than Section 77p. The latter extinguishes state law claims, consistent with Congress's goal to prohibit

state law actions that were intended to evade the PSLRA. Although subsection (c) provides for the removal of those cases from state to federal court, they are immediately subject to dismissal under subsection (b). The point of the prohibition is to require plaintiffs to plead their claims under federal law, which is exactly what respondents properly did here. By contrast, on petitioners' reading, the role of the amendment to Section 77v(a) is to shift Securities Act class actions from state to federal court, where they will be litigated on the merits.

That is a profound disharmony. It would have been bizarre and misleading for Congress to use the phrase "as provided in section 77p" to refer to a body of cases that is so different from those regulated by that provision, and to produce such a different result for those cases. Congress is especially unlikely to have used that language to identify lawsuits that assert exclusively federal law claims under the Securities Act, when those suits are not targeted—or even mentioned—by Section 77p *in any respect*.

2. Petitioners' counter-argument is that Congress wrote SLUSA to select three different kinds of covered class actions for three different kinds of treatment: state law claims of misstatements or fraud with respect to covered securities (precluded by Section 77p); pure Securities Act claims (excluded from state court jurisdiction by Section 77v(a)'s jurisdictional provision); and mixed cases that combine the two (removable to federal court under Section 77v(a)'s removal provision). *See* Pet. Br. 16-18. But that is just a description of the bizarre structure that petitioners' tortured reading would create, not something

Congress would actually have intended as it sought to harmonize the various provisions.

There specifically is no merit to petitioners' claim that SLUSA targets three distinct categories of cases. Sections 77v(a) and 77p contain three provisions with the *identical*—not distinct—scope: each reaches cases that advance a prohibited state law claim (including mixed cases that also advance other claims). Thus, the core prohibition of Section 77p(b) applies to mixed cases because it forbids any covered class action "based upon" state law, without regard to whether the lawsuit also includes a federal claim. A plaintiff obviously could not avoid preclusion by, for example, combining a state law claim in a single lawsuit with one under the Exchange Act. In turn, the removal provisions of Sections 77p(c) and 77v(a) incorporate and track the scope of Section 77p(b). 15 U.S.C. §§ 77p(c) (removal applies to cases "as set forth in subsection (b)"), 77v(a) (removal is limited "as provided in section 77p(c)"); *see generally Kircher v. Putnam Funds Tr.*, 547 U.S. 633 (2006).

There is no reason that Congress would have intended the sole remaining provision—the jurisdictional limitation in Section 77v(a)—to be an outlier addressing an entirely different class of cases. To the contrary, Section 77v(a)'s jurisdictional provision is obviously intended to reach the same cases as its removal provision. The point of those parallel amendments enacted by SLUSA is to ensure that if a state court fails to adhere to the limits on its jurisdiction imposed by the former, the defendant has access to a federal forum (which will dismiss the case) under the latter. *See Kircher*, 547 U.S. at 643-44 & n.l2 (applying the same reasoning to the removal provision

of Section 77p(c)). But petitioners read the jurisdictional and removal provisions of Section 77v(a) to refer to entirely different sets of cases.

Petitioners' only answer is that because the removal provision is narrower, this anomaly is necessary to ensure that class actions asserting claims only under the Securities Act may not be filed in state court. Pet. Br. 18. But that just assumes petitioners' conclusion. The point of examining the statute's structure is to determine if Congress actually intended to exclude class actions that assert only a claim under the Securities Act. Petitioners thus miss—or hope to avoid—the point: *whatever* cases containing Securities Act claims that SLUSA subjected to removal—*viz.*, those precluded by Section 77p—are the same cases that it excluded from the state courts' jurisdiction. Those were mixed cases.

Petitioners also argue that only their reading treats suits under the Securities Act and the Exchange Act consistently because both would be litigated in federal court. Pet. Br. 33-34. But petitioners' reading does not even actually produce that result: it would move only larger "covered" class actions, not individual suits or smaller group actions, to federal court.

In any event, there is no substantial evidence that Congress enacted SLUSA to require that both Securities Act and Exchange Act suits be filed in federal court. Congress has always treated those two statutes differently: plaintiffs were always able to bring cases under the Securities Act in state court; cases under the Exchange Act have always been within the federal courts' exclusive jurisdiction. *See infra* at 8a (reproducing the text of 15 U.S.C. § 77v(a)

prior to SLUSA's amendment); 15 U.S.C. § 78aa(a). The difference may reflect Congress's judgment to require claims under the Exchange Act to be litigated in federal court because that statute extends liability to far more parties involved in vastly more transactions, as it encompasses misstatements in the open market. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) (explaining that Securities Act and Exchange Act "involve distinct causes of action and were intended to address different types of wrongdoing") ; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728-30, 752-53 (1975) (discussing at length the differences in purpose, scope, history, and underlying policy between the express remedies under the Securities Act and the implied remedy under § 10(b) of the Exchange Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-11 (1976) (same). If Congress had intended SLUSA to change that long-settled regime, it would naturally have amended the Securities Act to say so expressly, tracking the federal courts' "exclusive jurisdiction" over Exchange Act suits. *See* 15 U.S.C. § 78aa(a); *supra* at 11, 16.

3. Petitioners finally argue that Congress would not have mixed apples and oranges by expressing a limitation on state courts' "jurisdiction" (set out in Section 77v(a)) in terms of a non-jurisdictional "preclusion" of certain securities suits (taken from Section 77p). But petitioners simply have no authority for the proposition that it is improper for Congress to allow a substantive provision to define the scope of a jurisdictional one.

In fact, what Congress did in SLUSA is perfectly ordinary and sensible. As discussed, it specified that

the state courts' jurisdiction over Securities Act claims in Section 77v(a) does not include mixed cases that also assert the state law claims precluded by Section 77p. In drafting an appropriate amendment, Congress essentially *had* to refer both to a jurisdictional provision and a preclusion provision—or at least that was the most straightforward approach—because Section 77v(a) is written in terms of the former and Section 77p the latter. Petitioners' argument that Congress would never do so—but instead would have left the conflict between the two provisions in place simply because of the formalism that Section 77v(a) is expressed in "jurisdictional" terms—does not accurately capture how laws are actually written.

Again, Section 77v(a)'s removal provision is highly instructive. As petitioners recognize (Br. 17-18), that provision incorporates Section 77p(c), which then defines the scope of removal *jurisdiction* exclusively in terms of the *prohibition* of Section 77p(b). *See* 15 U.S.C. §§ 77v(a) (removal prohibited "[e]xcept as provided in section 77p(c)"), 77p(c) (removal permitted for a covered class action "involving a covered security, as set forth in subsection (b)").

On respondents' reading, Section 77v(a)'s jurisdictional provision operates the same way: it just incorporates Section 77p as a whole instead of Section 77p(c). There is no greater incongruity in that statutory cross-reference than there is in Section 77p(c)'s reference to Section 77p(b).

Moreover, the fact that Section 77v(a) incorporates Section 77p does not render the former provision any less "jurisdictional": it defines the state courts' jurisdiction by reference to the body of cases that are prohibited by Section 77p. In plain English,

the amendment provides that state courts have jurisdiction over any Securities Act suit not prohibited by SLUSA. There is nothing unnatural about that.

Finally, even if this argument is correct—and it is not—it does not help petitioners. The consequence of deciding that Section 77v(a) can only incorporate the "jurisdictional" parts of Section 77p would not be to read it to incorporate the definition of "covered class action," because the definition provision is not even arguably a jurisdictional provision. Instead, the logical reading would incorporate the central jurisdictional provision of Section 77p: subsection (c), which provides for the removal cases from state to federal court. On that reading, the state courts would have jurisdiction over mixed cases that were not subject to removal under "section 77p." This is not such a case, so it would remain within the state courts' jurisdiction.

The other alternative would be to conclude, as the Solicitor General suggested at the certiorari stage, that "nothing in Section 77p . . . even arguably 'provide[s]' an exception to the general rule of concurrent jurisdiction," and hold that the jurisdictional amendment is essentially a road to nowhere because limitations on state court jurisdiction require unusually clear language, and SLUSA does not contain any. CVSG Br. 8; *see also id.* at 11. In that case, too, the state courts would have jurisdiction over respondents' suit.

C. Petitioners Misstate SLUSA's Purpose.

Petitioners lean heavily on the claim that Congress enacted SLUSA to move all federal securities class action litigation to federal court. *See, e.g.*, Pet. Br. 11, 13, 18, 21-23. That is not accurate. In

three decisions, this Court has carefully studied SLUSA's text, structure, and history. Only respondents' reading is consistent with the Court's correct understanding of Congress's intent.

In *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006), the Court explained that the PSLRA

> placed special burdens on plaintiffs seeking to bring federal securities fraud class actions. But the effort also had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court. . . . To stem this "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the [PSLRA], SLUSA § 2(2), (5), 112 Stat. 3227, Congress enacted SLUSA.

Dabit, 547 U.S. at 82. *Dabit* further noted that SLUSA was not drafted "cavalierly," but instead "carefully exempts from its operation" various class actions that remain within the jurisdiction of the state courts—provisions that "evince[] congressional sensitivity to state prerogatives in this field." *Id.* at 87.

In *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006), the Court reaffirmed that Congress enacted SLUSA "[t]o block this bypass of the [PSLRA]" described by *Dabit*. Addressing the nature of Section

77p's prohibition, the Court explained that its "purpose" was "to preclude certain vexing state-law class actions," and that the statute "avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether." *Id*. at 644 n.12. SLUSA thus does not express "any policy of having particular suits tried in a federal court." *Id.*

And in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), the Court rejected efforts to extend SLUSA's reach based on the claim that Congress broadly intended to shift securities class action litigation to federal court. The Court recognized that "the Act focuses upon transactions in covered securities, not upon transactions in uncovered securities," about which "the Act expresses no concern." *Id.* at 1066. The Court again stressed the "congressional care" taken to "purposefully maintain[] state legal authority," whereas "[a] broad interpretation of [SLUSA] works at cross-purposes with this state-oriented concern." *Id.* at 1068-69 (citation and quotations omitted). *See also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (reiterating that SLUSA was enacted "to prevent plaintiffs from circumventing [the PSLRA's] restrictions by bringing securities class actions under state law in state court").

Only respondents' reading is consistent with this Court's careful study of Congress's intent in enacting SLUSA. Respondents' interpretation tracks the statute's purpose to stop the use of state law securities claims to evade the PSLRA's restrictions. The "conforming amendments" to Section 77v(a) withdraw

state court jurisdiction over suits prohibited by Section 77p, while accounting for all of the limitations Congress carefully placed on SLUSA's scope in Section 77p itself.

By contrast, petitioners' reading does nothing to advance the statute's purpose, because it is completely untethered from the state law cases that motivated Congress to enact SLUSA. Petitioners argue that SLUSA was designed to prevent circumvention of the PSLRA, and that forcing all Securities Act cases into federal court furthers that purpose because the PSLRA's procedural requirements relating to class actions apply only in federal court. Pet. Br. 37. This argument ignores the fact that when Congress enacted the PSLRA itself, state courts had been adjudicating Securities Act cases for sixty years; indeed, their power to do so was explicitly recognized in Section 77v(a). Congress clearly knew this, which is why some of the PSLRA's reforms apply in state court too. *See, e.g.*, PSLRA § 102 (creating the safe harbor for forward-looking statements codified at 15 U.S.C. § 77z-2). Indeed, some are amendments to the substantive provisions of the Securities Act itself. *See, e.g.*, PSLRA §§ 103 (amending Section 20 of the Securities Act to prohibit attorney's fees paid from disgorgement funds), 105 (amending Section 12 of the Securities Act to create a loss-causation defense), 201 (amending Section 11 of the Securities Act to limit the liabilities of outside directors). But the PSLRA did not attempt to modify state courts' concurrent jurisdiction over Securities Act claims. And it did not attempt to force state courts to adopt different class action procedures—even though it found those procedural reforms appropriate for federal courts. In other words,

the PSLRA, which was Congress's principal effort to curb abusive securities litigation, allowed state courts to continue adjudicating Securities Act class actions under their own procedures. It cannot be circumvention of the PSLRA for state courts to continue doing precisely that.

Indeed, there simply is no evidence that Congress regarded state court adjudication of cases alleging only Securities Act claims to be a problem when it enacted SLUSA. In contrast with the uptick in state law securities fraud filings after the PSLRA, petitioners have not presented any comparable evidence that the enactment of the PSLRA spurred more Securities Act class actions in state court. The table of cases petitioners appended to the Petition for Writ of Certiorari, for example, listed a grand total of two cases filed between the enactment of the PSLRA (December 22, 1995) and SLUSA (November 3, 1998). *See* Pet. App. 31a. In their merits brief, petitioners do not identify any additional cases, nor any other evidence suggesting that a large number of Securities Act class actions migrated to state court after the PSLRA. This again belies their contention that Congress went out of its way in SLUSA—a statute designed to reinforce the PSLRA—to strip state courts of jurisdiction over such cases.

It makes sense that Congress was not particularly concerned about Securities Act cases. SLUSA's overarching goal is to ensure uniformity by forcing class action plaintiffs to eschew diverse state law causes of action and file claims relating to covered securities under federal law. Respondents—like every plaintiff that asserts only claims under the Securities Act—did just that. Because every covered class action

under the Securities Act is already governed by uniform federal substantive standards, and because there is no evidence that state courts were refusing to apply those standards faithfully, there was no reason for Congress to create exclusive federal jurisdiction over those cases.

Petitioners' claim that SLUSA broadly withdraws the state courts' jurisdiction also cannot be reconciled with this Court's recognition that Congress wrote the statute to preserve the authority of the states, including the state courts. Among other examples, SLUSA is carefully limited to suits involving "covered securities," because they are more consequential to the national economy and because those were traditionally filed in federal court prior to the PSLRA. "Foremost on Congress's mind were securities class action lawsuits involving nationally traded securities, known as 'covered securit[ies]' under the statute." Pet. Br. 24. But petitioners concede that their interpretation "divests state courts of jurisdiction over 1933 Act claims in covered class actions involving *non*-covered securities, too." *Id.* at 29.

Petitioners spend ten pages (Br. 20-30) attempting to recharacterize SLUSA's purpose, based almost exclusively on isolated snippets of legislative history. But this Court's decisions have already examined the legislative materials in detail and, as discussed, they support only respondents' interpretation. Manifestly, the legislative history does not provide an "unmistakable" indication of Congress's intent to adopt petitioners' atextual interpretation. *Mims*, 565 U.S. at 378; *see also Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) (unanimously finding no unmistakable evidence of

intent to oust the states even though "most legislators, judges, and administrators . . . expected that [Title VII of the Civil Right Act] would be processed exclusively in federal courts").

Of note, petitioners do not identify any congressional finding or authoritative report that characterizes SLUSA as petitioners do—*viz*., that the statute withdraws state court jurisdiction over all covered class actions asserting Securities Act claims. *Cf., e.g.*, S. Rep. No. 105-182, at 1 (1998) (stating that the purpose of the bill is "to limit the conduct of securities class actions under State law"). The most authoritative materials that petitioners cite instead state unqualifiedly that the statute applies only to "covered securities." *See, e.g.*, SLUSA § 2(5) (statutory finding); H.R. Conf. Rep. No. 105-803, at 13 (1998). But as noted, petitioners' reading has no such limitation: it applies to claims relating to *any* security.

Petitioners' other squibs from legislative history do not require extended attention because none actually characterize the statute as petitioners do and, even if they did, they would be entitled to little weight because they are from individual members of Congress or—even worse—hearing witnesses. The Court should be wary of isolated statements that were planted in the legislative history, precisely because there were not sufficient votes in Congress to adopt them as law. There is no reason to believe that Congress in enacting the bill, or the President in signing it, agreed with any statement that petitioners cite. But as the *amicus* briefs detail, even the individual statements relating to the bill—like the other legislative materials—support respondents' interpretation on the whole.

Because petitioners' interpretation of SLUSA cannot be reconciled with the statutory text, structure, or legislative materials, the judgment should be affirmed.

III. There Is No Merit To The Solicitor General's Removal Argument.

The Solicitor General agrees with respondents' interpretation of the state courts' jurisdiction under Section 77v(a). CVSG Br. 6. But at the certiorari stage, the government asserted that Section 77p(c) would permit the removal of a covered class action asserting a claim under the Securities Act, without regard to whether the complaint includes a state law claim. CVSG Br. 6. Respondents will have no written opportunity to answer the Solicitor General's *amicus* brief on the merits, but it presumably will make the same argument. Respondents therefore anticipate it here.

Petitioners did not attempt to remove this case on the basis suggested by the Solicitor General, probably because the government's reading cannot be reconciled with the plain statutory text, is internally contradictory, and is precluded by this Court's on-point precedent. Section 77p(c) is by its terms limited to the subset of covered class actions "set forth in subsection (b)." 15 U.S.C. § 77p(c). The Solicitor General acknowledges that removal under Section 77p(c) incorporates *one* of the distinct requirements of Section 77p(b): that the plaintiff allege a misrepresentation, omission, or fraud. CVSG Br. 14. But the government asserts without any explanation that it excludes another: that the complaint assert a claim "based upon the statutory or common law of any

State." *Id.* 16-17. There simply is no way consistent with the text to cherry-pick from the statute in that manner.

The Solicitor General's argument is also internally contradictory. In rejecting petitioners' interpretation of Section 77v(a) at the certiorari stage, the Solicitor General correctly reasoned that Congress would not have wanted to strip state courts of jurisdiction over more cases than it intended to preclude under Section 77p(b). CVSG Br. 9. But inconsistently, the government embraces essentially that result: its reading would permit removal (and thus eliminate state court jurisdiction) for cases that would not be precluded under Section 77p(b) because they do not include a state law claim.

For those and other reasons, the government's reading is in the teeth of *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), which rejected the exact argument that the Solicitor General makes here: that Section 77p(c) permits the removal of cases that are not prohibited by Section 77p(b). In *Kircher*, the district court remanded a suit to state court on a ground specified in Section 77p(b) but not 77p(c): that the complaint's allegations did not relate to the "purchase or sale" of a security. The Seventh Circuit held that it had jurisdiction over the defendant's appeal. It reasoned that *only* the limitations set forth *explicitly* in Section 77p(c)'s removal provision—not those incorporated through Section 77p(b)'s prohibition—were "jurisdictional" and thus subject to prohibition on appeals of remand orders. *Kircher*, 547 U.S. at 638-39.

This Court rejected that interpretation of Section 77p without difficulty. It adopted "the straightforward

reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." *Id*. at 643. The Court explained that "if we did read the removal power that broadly there would be no point to the phrase 'as set forth in subsection (b),' for subsection (b) cases would be removable anyway as a subset of covered class actions." *Id.* Further, the very purpose of the remand provision is to guarantee a federal forum in the event a state court fails to dismiss a suit prohibited by Section 77p(b). *Id.* at 642-43. Thus, "removal jurisdiction under subsection (c) is . . . restricted to precluded actions defined by subsection (b)." *Id.* at 643-44.

The Seventh Circuit's reasoning in *Kircher* was at least coherent—*viz.*, the court of appeals believed that all the requirements set out in Section 77p(c) were jurisdictional and all those incorporated from Section 77p(b) were not. But the government's argument in this case—that Section 77p(c) includes one of Section 77p(b)'s restrictions but not another—has no textual basis at all. It is therefore even more obviously wrong.

The Solicitor General would distinguish *Kircher* because parts of two sentences in the opinion mentioned one of Section 77p(b)'s requirements—that the suit involve "claims of untruth, manipulation, and so on" and "claims like untruth or deception," *id.* at 642—but did not repeat that subsection (b) is limited to state law claims. CVSG Br. 16 (citing *Kircher*, 547 U.S. at 642-43). This is bad literary criticism, not good legal argument. The *expressio unius* canon is not the guide to reading those snippets of *Kircher*, because the words of opinions are not written to be scrutinized like statutes.

The sentences the government cites expressly refer to subsection (b). The few words the government quotes from those sentences merely illustrate that subsection (b) has additional requirements beyond those specified in subsection (c). There are four: that the action be brought by a private party, under state law, alleging misstatements or fraud, in the purchase or sale of a covered security. 15 U.S.C. § 77p(b). It was not necessary for the opinion to reproduce all of them, every time. Nor did it purport to, as even the snippets quoted by the Solicitor General use the non-exclusive phrases "and so on" and "claims like." *Kircher*, 547 U.S. at 642.

Look no further than the fact that those same sentences omit subsection (b)'s requirement that the suit relate to "the purchase or sale" of a security. But that was the requirement directly at issue in *Kircher* itself. So it must have been within the Court's holding, despite that it was not mentioned in the short squibs the government now quotes.

In truth, the government does not seriously argue that its position can be reconciled with *Kircher*'s explicit holding, which was in turn based on the plain text and the statute's purpose: removal under Section 77p(c) is limited to the cases that are precluded by Section 77p(b). The inescapable position of the Solicitor General is that *Kircher* is wrongly decided: on the government's view, removal extends to cases that do not assert state law claims. That would mean that if the district court in *Kircher* had instead remanded the case on the ground that the complaint only asserted a claim under the Securities Act rather than state law, that ruling could have been appealed. That cannot be right. Because the government gives the

Court no reason to doubt the correctness of *Kircher*, much less overrule it, the judgment should be affirmed.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

Andrew S. Love
John K. Grant
ROBBINS GELLER RUDMAN & DOWD LLP
Post Montgomery Center
One Montgomery Street
Suite 1800
San Francisco, CA 94104

Robert V. Prongay
Ex Kano S. Sams II
GLANCY PRONGAY & MURRAY LLP
1925 Century Park East
Suite 2100
Los Angeles, CA 90067

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
202.362.0636
tg@goldsteinrussell.com

STATUTORY ADDENDUM

STATUTORY ADDENDUM

15 U.S.C. § 77p, Additional Remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

> **(1)** an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> **(2)** that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves--

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that--

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this

subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action--

(A) In general

The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed

parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 77v, provides, in relevant part:

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No

costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Prior to its amendment in 1998, 15 U.S.C. § 77v(a) provided:

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.