No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES' RETIREMENT FUND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of the State of California for the County of San Francisco

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek review of an unpublished order of a California state trial court that concededly conflicts with no state or federal appellate ruling on a question that only one appellate court in the nation has ever decided. The question is whether after the Securities Litigation Uniform Standards Act of 1998 state courts continue to possess concurrent jurisdiction over claims brought under the Securities Act of 1933, just as they always have since that statute's enactment.

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STATEMENT OF THE CASE

For more than eighty years, since the enactment of the Securities Act of 1933 ("1933 Act"), state courts have had concurrent jurisdiction to decide federal law claims brought under that statute. In the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Congress precluded certain *state law* securities class actions outright. In a "Conforming Amendment," H.R. Rep. No. 105-640 at 4, 16 (1998); H.R. Rep. No. 105-803 at 5 (1998), Congress amended the 1933 Act to reflect that limitation on state court claims.

Consistent with state courts' longstanding jurisdiction, respondents brought this lawsuit against petitioners in a California superior court asserting claims under the 1933 Act. Petitioners moved to dismiss, asserting that the Conforming Amendment did not merely preclude state law class actions outright, but also did something very different: eliminated concurrent jurisdiction for 1933 Act claims. The superior court rejected that argument, applying *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011), a state appellate ruling that this Court previously declined to review. Both the state court of appeals and the state supreme court declined to review the superior court's interlocutory ruling.

1. From the earliest days of the federal securities laws, state courts have possessed concurrent jurisdiction over securities claims brought under both state law and the 1933 Act. Jurisdiction over state claims was, of course, provided by state law. With respect to federal claims under the 1933 Act, that statute expressly provided for jurisdiction of federal courts, "concurrent with State . . . courts"

> of all suits . . . brought to enforce any liability or duty created by this title. . . . [And that n]o case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Securities Act of 1933, Pub. L. No. 73-22, Title I, § 22, 48 Stat. 86, *codified as subsequently amended at* 15 U.S.C. § 77v(a). By contrast, federal district courts possess exclusive jurisdiction to decide claims under the Securities Exchange Act of 1934 ("1934 Act"). 15 U.S.C. § 78aa(a).

Subsequently, in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress imposed a variety of procedural restrictions on the litigation of securities fraud class actions under the federal securities laws. PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995); *see Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). In response, some shareholders began filing essentially the same securities fraud class action claims, pleaded instead under state securities laws in state and federal court. *Id*.

Congress enacted SLUSA as a targeted response to the use of state law claims to evade the PSLRA. SLUSA added substantive provisions to the 1933 Act and the 1934 Act precluding certain state law securities class actions altogether. *See Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068 (2014); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). In § 77p, SLUSA precludes "covered class actions" alleging deception with respect

to "covered securities,"[1] from being maintained in state or federal court, but *only* with respect to claims "based upon the statutory or common law of any State." 15 U.S.C. § 77p(b). If plaintiffs nonetheless bring a prohibited state law suit in state court, it may be removed to federal district court, where it must be dismissed. 15 U.S.C. § 77p(c).

SLUSA thus eliminates the ability to adjudicate state law securities class action claims in state and federal court. SLUSA therefore included a "Conforming Amendment" to the 1933 Act. That amendment modified the 1933 Act's provision (quoted above) to provide for jurisdiction of federal courts, concurrent with state courts, "except as provided in section [77p of this title] with respect to covered class actions." SLUSA, Pub. L. No. 105-353, Title I, § 101(a)(3), 112 Stat. 3230 (1998), *codified at* 15 U.S.C. § 77v(a). Further, removal of claims under the 1933 Act is prohibited "[e]xcept as provided in section [77p](c) of this title." *Id.* Section 77p is the provision that precludes certain state law "covered class actions"; § 77p(c) is the specific subsection that permits the removal of the state law suits prohibited by SLUSA in order to be dismissed automatically thereafter by the federal district court.

2. In 2014, respondents brought this covered class action against petitioners in California superior court. Respondents' complaint asserts claims under the 1933 Act. It does not assert any state law claim subject to SLUSA.

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[1] A "covered class action" involves fifty or more plaintiffs. 15 U.S.C. § 77p(f)(2)(A)(i). A "covered security" is principally a security traded on a national exchange. 15 U.S.C. § 77r(b)(1).

Petitioners themselves previously recognized that "Congress has left in place federal and state concurrent jurisdiction of claims under the Securities Act of 1933." Petition for Review, *Cyan v. Superior Court of California*, California Supreme Court No. S222702, at 4 (Nov. 21, 2014). Petitioners nonetheless moved to dismiss this suit for lack of jurisdiction. They argued that the Conforming Amendment eliminated state court jurisdiction over covered class actions asserting claims under the 1933 Act, requiring dismissal. According to petitioners, when Congress specified that federal and state courts possess concurrent jurisdiction "except as provided in Section 77p of this title with respect to covered class actions," it eliminated state court jurisdiction over *all* "covered class actions," including class actions asserting federal claims under the 1933 Act.

The superior court rejected petitioners' argument on the basis of the California Court of Appeal's ruling in *Countrywide*, 195 Cal. App. 4th 789, which both the California Supreme Court and this Court previously declined to review. *Countrywide Fin. Corp. v. Luther*, 565 U.S. 1080 (2011); California Supreme Court No. S194319 (Sep. 14, 2011). The appellate court in *Countrywide* recognized that SLUSA's Conforming Amendment preserves the ability of state courts to adjudicate 1933 Act claims "*[e]xcept as provided in Section 77p*." 195 Cal. App. 4th at 795 (emphasis in original). In turn, § 77p "provides" only two limitations with respect to maintaining securities claims in state courts. Consistent with Congress's targeted response to the use of state law securities fraud claims to evade the PSLRA, § 77p: (i) precludes *state law* securities fraud class action claims, and (ii) provides that those same *state law* claims may be removed to a federal district court, which must dismiss them. By

contrast, § 77p does not "provide" anything with respect to maintaining class actions in state court generally, including class actions under the 1933 Act. Thus, the Conforming Amendment

> does not say that there is an exception to concurrent jurisdiction for *all* covered class actions. Nor does it create its exception by referring to the definition of covered class action in . . . section 77p(f)(2). Instead, it refers to section 77p without limitation, and creates an exception to concurrent jurisdiction only as provided in section 77p "with respect to covered class actions."

Countrywide, 195 Cal. App. 4th at 795 (emphasis added).

The superior court's ruling rejecting petitioners' jurisdictional objection was interlocutory. Petitioners sought review in the California Court of Appeal, which declined to review the case. California Court of Appeal, First Appellate Dist., No. A146891 (Dec. 10, 2015). Petitioners then sought review in the California Supreme Court, which has never decided the Question Presented, and which denied review as well. California Supreme Court No. S231299 (Feb. 24, 2016).

REASONS FOR DENYING THE WRIT

This case does not come close to satisfying any of the criteria for this Court's review. This Court lacks jurisdiction to review the unpublished, interlocutory ruling of the state superior court. That ruling, moreover, has only ever been the subject of a single appellate ruling and does not conflict with any appellate authority in any state or federal court. There is no merit to petitioners' arguments that obstacles exist to such a conflict emerging, and so this Court should

reject petitioners' request to depart from its ordinary criteria for review. The ruling below is, moreover, correct.

1. This Court lacks jurisdiction because the Superior Court's decision denying petitioners' motion for judgment on the pleadings is not "final" within the meaning of 28 U.S.C. § 1257.

Petitioners acknowledge, as they must, that "merits litigation is ongoing in the Superior Court," and so the decision below plainly is interlocutory. Petition for Writ of Certiorari ("Pet.") 17. Indeed, an order denying a dispositive motion is the opposite of final because it "ensures that litigation will continue." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). Petitioners argue, however, that the Superior Court's interlocutory decision should be treated as final because the jurisdiction question is discrete and anterior to the merits, and it would serve various policy objectives to consider it sooner rather than later. These arguments are unpersuasive.

The limitations on this Court's power embodied in § 1257 are long-settled, and rooted in powerful principles of "efficiency, judicial restraint, and federalism." *Pennsylvania v. Ritchie*, 480 U.S. 39, 72 (1987) (Stevens, J., dissenting). Although this Court has, on occasion, granted certiorari to consider a state court's resolution of a federal question before the conclusion of state proceedings, petitioners have not cited a case in which the underlying substantive claim itself arose under federal rather than state law. Indeed, this Court has recognized that "[i]n most, if not all, of the cases" in which it has exercised jurisdiction, the additional state "proceedings would *not* require the decision of other federal questions that might also require review by the Court at a later date." *Cox Broad. Corp.*

v. Cohn, 420 U.S. 469, 477 (1975) (emphasis added). Thus, in describing *Construction & Gen. Laborers' Union v. Curry*, 371 U.S. 542 (1963), and *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), both cited by petitioners, the Court noted that in each case, "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court" and preventing the Court from considering the federal question after final judgment. *Cox*, 420 U.S. at 482-83. Here, however, there are no potential alternate state grounds that would frustrate this Court's exercise of jurisdiction after a true final judgment. If petitioners lose on the merits, they can bring their jurisdictional claim to this Court's attention in due course. Moreover, delaying review until after final judgment would prevent "piecemeal review with respect to federal issues." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

In light of that fact, petitioners' policy arguments are unpersuasive. If petitioners are correct about the merits, then the policies embodied in the PSLRA can be vindicated upon review after a final judgment in this case. Indeed, petitioners' position is no different from any other class action defendant that fails to win by dispositive motion. On the other hand, petitioners do not address the countervailing policy concerns, *i.e.*, that immediate review in this Court will deal a blow to the federalism, comity, and efficiency principles that underlie § 1257.

Petitioners cite *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), which held that the denial of qualified immunity was reviewable on appeal under 28 U.S.C. § 1291. But qualified immunity presents an unusual exception to the long-established rule that "denial

of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). And immunity is, of course, different from petitioners' effort to dismiss respondents' action because petitioners are not arguing that they are entirely immune from suit; they are only disputing the appropriate forum. This Court has never regarded such decisions as final. *See*, *e.g.*, *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989) (holding that denial of motion based on contractual forum clause was not final because the clause did not entitle the petitioner "to avoid suit altogether, and an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum"); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (holding that the question is whether "the claimed right is a right not to stand trial"). Here, petitioners themselves argue that the "right" they are asserting is the right to litigate in a federal forum – *i.e.*, exactly the sort of right that this Court has found insufficient to trigger finality in the § 1291 context. Pet. 19.

To put it another way: if a federal district court had refused to dismiss a case under the 1993 Act for lack of subject matter jurisdiction, that decision would not be appealable to a circuit court of appeals, let alone this Court. It is odd indeed for petitioners to argue that a substantively identical decision, rendered in a state trial court, should receive greater scrutiny from this federal appellate Court.

2. Even if this Court possessed jurisdiction, certiorari should be denied. The interlocutory posture of the case counsels strongly in favor of deferring review until the entry of a final judgment. The state court of appeal and state supreme court have not yet spoken

to the superior court's jurisdiction over this case, and either could do so later in the proceedings, *e.g.*, after final judgment. Also, because respondents' substantive claims arise under federal law, and could therefore present one or more issues meriting review in this Court, the more efficient course is to permit all of the federal law issues in the case to be presented together in a single petition after the entry of final judgment.

Further, only one appellate court in the country has *ever* decided the Question Presented. This Court routinely permits such issues to percolate in the appellate courts to determine whether a conflict arises and to give time for a better understanding of the legal question to emerge.

Because the issue has only ever been decided by a single appellate court, by definition the unpublished, nonprecedential ruling below does not conflict with any state or federal appellate authority. Petitioners do not contend otherwise. Review is inappropriate for that reason alone.

Petitioners argue that this Court should depart from its ordinary criteria for granting certiorari because it is unlikely that a conflict could ever emerge. In fact, state appellate courts can easily decide the Question Presented, and could create a conflict worthy of review. As discussed, the issue was decided by a California court of appeal in *Countrywide*. Although petitioners are correct that the ruling in *Countrywide* currently binds California superior courts, they omit the far more important point: that is only because no state court of appeal in any of the other five appellate districts in California has yet decided the issue. There is no obstacle to defendants securing such a ruling in their favor. *See Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 (2008). This case is proof positive:

petitioners sought interlocutory review in a different California court of appeal. There, they described such review as "[r]outine[]." Petition for Writ of Mandate and/or Prohibition or Other Relief, *Cyan, Inc. et al. v. Beaver County Employees Retirement Fund, et al.*, California Court of Appeal, First Appellate District, No. A146891, at 8 (Dec. 2, 2015).

The state supreme court can decide the question (whether or not the court of appeal grants review), but has not yet done so – although it could in another case or after the entry of final judgment in this case. Petitioners themselves sought review in the California Supreme Court. It is no surprise that the state supreme court would decline to step in to review an interlocutory jurisdictional objection in the absence of any conflict in its lower courts. But that hardly provides a basis for *this* Court to do so given that the question has been decided by only one appellate court anywhere in the nation.

And that is just California. There are forty-nine other states, the District of Columbia, and courts of U.S. territories. Claims under the 1933 Act can be, and are, brought in those local courts. The relevant appellate courts can review those rulings, frequently an interlocutory matter and always after the entry of final judgment. Petitioners' argument that cases under the 1933 Act are regularly brought in state court means only that this Court will have no shortage of opportunities to decide the Question Presented.

Review is also available in the federal courts of appeals, in exactly the same fashion as every other context in which a claim is removed from state to federal court, which must then consider whether to remand the dispute to state court. Contrary to the necessary assumption of petitioners' argument, this

Court has not applied different certiorari criteria in such cases. The very fact that Congress generally precluded the courts of appeal from reviewing orders granting remand is strong evidence that this Court's immediate intervention in such cases is not warranted.

Although appellate review may be unavailable in cases in which the district court grants remand, that is not uniformly true. *Luther v. Countrywide Home Loans Sevicing LP*, 533 F.3d 1031, 1033 (9th Cir. 2008); *Illinois Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 848-49 (7th Cir. 2004). Further, petitioners' suggestion that remand is frequently granted is ultimately just an acknowledgment that their interpretation of the Conforming Amendment lacks merit. Remand is granted only because district courts overwhelmingly *agree* with the ruling below. In such circumstances, where there is little to no disagreement in the lower courts, this Court's intervention is unwarranted.

If federal district courts instead reverse course and begin to adopt petitioners' argument on the merits, they will deny remand and the plaintiffs can seek permission to appeal under 28 U.S.C. § 1292 or appeal from the eventual final judgment. The subsequent appellate rulings would, of course, be subject to review in this Court.

Petitioners argue that it is frequently costly to await the outcome of the proceedings in the trial court. To the extent that is so, it is not remotely unique to this Question Presented. The same could be said with respect to every securities class action – indeed, every class action. Yet, this Court has not applied different certiorari criteria in those contexts.

3. There is accordingly no merit to petitioners' argument that the Question Presented has led to "chaos" in the lower courts. There is no conflict in any binding precedent at any level of any state or federal court anywhere in the United States. There simply is no precedent for this Court to grant review in such a circumstance, where the Question Presented has only ever been decided by a single appellate court in the nation – and by no state supreme court or federal court of appeals.

Petitioners identify a supposed conflict in district court rulings, highlighting decisions issued from 2015 onward. Pet. 12 n.10. In fact, there is now a "dominant view around the country" (*Badri v. TerraForm Global*, *Inc.*, No. 15-cv-06323-BLF, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016) (quotation marks and citation omitted), that "has almost uniformly been upheld by the district courts since 2012." *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics*, *Inc*., 125 F. Supp. 3d 917, 921 (N.D. Cal. 2015).

In the post-2014 period highlighted by petitioners, nineteen federal district courts have decided the Question Presented. Of those, only two accepted petitioners' argument, one in a two-paragraph summary order[2]; the other seventeen are consistent with the ruling below.[3] Petitioners' self-selected period also omits

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[2] *Hung v. iDreamSky Tech. Ltd*., No. 15-CV-2514 (JPO), 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016); *Wunsch v. Am. Realty Capital Props*., No. JFM-14-4007, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015).

[3] *Westmoreland Cnty. Emp. Ret. Fund v. Inventure Foods*, *Inc.*, *et al.*, No. 2:16-cv-01410-PHX-JMM, slip op. (D. Az. Aug. 11, 2016); *Rivera v. Fitbit*, *Inc.*, No. 16-CV-02890-SI, 2016 WL 4013504 (N.D. Cal. July 27, 2016); *Pytel v. Sunrun Inc.*, No. C 16-2566-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 12,

the time between August 2012 and January 2015, in which five district courts decided the Question Presented, all consistent with the decision below.[4] So, in the past four years, defendants are batting two for twenty-four – less than 9% of cases.[5] That is a pattern

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2016); *Elec. Workers Local #357 Pension and Health & Welfare Trs. v. Clovis Oncology*, *Inc.*, No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. May 5, 2016); *Fortunato v. Akebia Therapeutics*, *Inc*., No. 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016); *Badri*, 2016 WL 827372; *Iron Workers Mid-South Pension Fund v. TerraForm Global*, *Inc*., No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global*, *Inc*., No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience*, *Inc*., No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow v. Alibaba Grp. Holding Ltd*., No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron Inc*., *et al*., No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 U.S. Dist. LEXIS 143390 (N.D. Cal. Oct. 21, 2015); *City of Warren.*, 125 F. Supp. 3d 917; *Liu v. Xoom Corp*., No. 15-CV-00602-LHK, 2015 U.S. Dist. LEXIS 82830 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp*., *Inc*., No. SA CV 15-0687-DOC (DFMx), 2015 U.S. Dist. LEXIS 75355 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Nat. Res*., *Inc*., No. 1:14CV1531, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015); *Plymouth Cty. Ret. Sys. v. Model N*, *Inc.*, No. 14-CV-04516-WHO, 2015 65110 (N.D. Cal. Jan. 5, 2015).

[4] *Rajasekaran v. CytRx Corp*., No. CV 14-3406-GHK (PJWx), 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo*, *Inc*., No. C 12-5636 CW, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife*, *Inc*., No. 2:12-cv-02626-HGD, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013); *Reyes v. Zynga*, *Inc*., No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013).

[5] Moreover, an average of six cases annually across the country is hardly the litigation tsunami portrayed by petitioners.

of uniformity in the district courts, not a striking conflict that requires this Court's early intervention.

Petitioners point to some older district court decisions. But disagreements among the district courts are commonplace and it is well-settled that they do not merit review in this Court. Further, those rulings bind no other court and the more recent pattern favoring the ruling below is clear. Unless that emerging consensus reverses itself in the courts of appeals, this Court should apply its ordinary criteria and deny certiorari.

Petitioners purport to identify a 1400 percent "spike[]" in California state court filings of 1933 Act cases since the California Court of Appeal's ruling in *Countrywide*. Only lawyers could come up with such statistics. Pet. 8. That is, in fact, a total of thirty-eight cases in five years, or an average of just over seven cases annually, Pet. 8 & n.5, which certainly is not so significant as to justify departing from this Court's ordinary certiorari criteria.

That is particularly true given that any increase in litigation plainly is not attributable to *Countrywide*. Petitioners argue to the contrary based only on the bald assertion of one of their fellow securities defense counsel. Pet. 27 n.36. But that self-interested argument makes no sense. *Countrywide* did not change the law: state courts have had jurisdiction over claims under the 1933 Act since the statute's adoption. Nothing about *Countrywide* would cause an increase in litigation; there were not even other appellate rulings around the country that would have inhibited such suits. Petitioners specifically note that fourteen of the thirty-eight California state cases were filed in 2015, but provide no explanation for why the 2011

decision in *Countrywide* would lead to an increase in new state court filings in California four years later.

Further, if petitioners were right that *Countrywide* and other cases rejecting their position increased state court litigation, they would be able to cite systemic increases in other states. They cannot.

In fact, the increase in claims under the 1933 Act is principally attributable to an increase in initial public offerings. It is those filings that have spiked in California, increasing from four in 2009 to twenty in 2010, and then rising in a steady progression to highs of forty-four in 2013 and fifty-four in 2014 – the years immediately preceding the greatest jump in 1933 Act cases.[6] For example, petitioner Cyan's IPO was one of

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[6] *See* Wilmer Hale, 2016 IPO Report, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2016-WilmerHale-IPO-Report.pdf. Importantly, it was not merely the volume of IPOs that led to an increase in 1933 Act cases in state and federal court, but the rise in grossly overvalued IPOs that were quick to miss earnings expectations after filing. *See*, *e.g.*, Laura Lorenzetti, IPOs raised $249 billion in 2014, and the fundraising frenzy could continue, *FORTUNE*, Jan. 5, 2015; Matt Krantz, IPOs rigged? 68% of new stocks fall short, *USA TODAY*, August 14, 2014. The Jumpstart Our Business Startups Act ("JOBS Act"), enacted in 2012, eased the requirements for going public for newer, growing companies. As reported by CFO.com, 76% of issuers that went public in the blockbuster year of 2014 filed under the JOBS Act. Many of these IPOs were of poor quality. As an October 2015 PriceWaterhouseCoopers study found, because "[s]maller companies are often limited in their accounting and financial reporting capabilities, given their stage of growth, small staff, and amount of resources they are able to invest in the business," those "limitations may result in a less-defined and more poorly developed internal control environment, which often leads to [material weaknesses]." PriceWaterhouseCoopers, Material weaknesses: Why disclosing them before your IPO may make sense, October 2015, www.pwc.com/us/en/deals/publications/assets/pwc-deals-ipo-material-weakness-disclosure.pdf. *See also*

forty-four filed in California in 2013. This increase in IPO filings – 1250% using petitioners' math – is why more such suits have been filed in *both* state *and* federal court in California, a critical fact that petitioners' statistics omit.[7] If petitioners were right, there would be fewer federal court suits, not more.

3. Finally, this Court's early intervention is unwarranted because the ruling below is plainly correct. The Conforming Amendment modifies the 1933 Act to provide that state courts continue to adjudicate claims brought under the 1933 Act "except as provided in section [77p of this title] with respect to covered class actions." SLUSA, Pub. L. No. 105-353, Title I, § 101(a)(3), 112 Stat. 3230 (1998), *codified at* 15 U.S.C. § 77v(a). Petitioners stress that the definition of "covered class actions" is not limited to state law claims. That is true, but not persuasive. The definition on which petitioners rely has no operative effect in isolation. Section 77p thus does not "*provide[]*" anything with respect to maintaining "covered class actions" generally, including actions raising only claims under the 1933 Act. Rather, § 77p "*provide[s]*" that "covered class actions"

Judy Greenwald, JOBS Act triggers rise in public stock offerings and IPO-related litigation, *BUSINESS INSURANCE*, October 12, 2014; John C. Coffee Jr., Gone With the Wind: Small IPOs, the JOBS Act, and Reality, *THE CLS BLUE SKY BLOG*, Feb. 1, 2013.

[7] To verify the increase in federal filings, respondents' counsel conducted a detailed search of public dockets found on the Stanford Law School's Securities Class Action Clearinghouse (http://securities.stanford.edu/filings.html), supplemented by Lexis Nexis Courtlink. Counsel searched for all post-SLUSA cases filed in federal district courts nationwide alleging 1933 Act claims, and reviewed the complaints in each case to verify the claims raised. This search disclosed nine cases filed in 2011, four cases in 2012, eight cases in 2013, four cases in 2014 and eleven cases in 2015.

asserting *state law* claims (§ 77p(b)) may not be maintained in state or federal court, and that such *state law* actions may be removed to federal district court to be dismissed (§ 77p(c)). The Conforming Amendment, in turn, addresses only those cases.

Petitioners read out of the statute the express reference to how § 77p "provide[s]" for limitations on maintaining covered class actions based on state law. If Congress intended SLUSA to operate as petitioners contend, it could have (and would have) written the statute differently. Similar to the 1934 Act, it would have provided that federal courts have "exclusive jurisdiction" for covered class actions under the 1933 Act. *See* n.10, *infra*.

Petitioners' argument also cannot be reconciled with Congress's purpose in enacting SLUSA. Congress's expressly stated goal in enacting that statute was to prevent the evasion of the PSLRA through the filing of *state law* securities claims. SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (SLUSA's purpose is "to limit the conduct of securities class actions under State law.") Congress further sought to promote uniformity by preventing "the dangers of maintaining differing federal and state standards of liability for nationally-traded securities." S. Rep. No. 105-182, at 3 (1998). Allowing 1933 Act claims to proceed in state court was completely consistent with the PSLRA, which permitted such suits, just as had always been true since the 1933 Act's adoption.

That is why petitioners err in arguing that state court suits under the 1933 Act are not subject to the PSLRA: that is true only because that is how Congress designed the PSLRA, generally choosing to respect state courts' authority over their own procedures. Nothing in SLUSA reversed that choice, which is

rooted in sound principles of federalism.[8] There is nothing unusual about recognizing "concurrent state court jurisdiction even where federal law provided for special procedural mechanisms" in federal court. *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (concurrent jurisdiction despite extended venue and service-of-process provisions for RICO cases that are only applicable in federal court).[9]

Contrary to petitioners' assertions (Pet. 28), adjudication of 1933 Act class action cases in state court does not undermine uniform interpretation of the 1933 Act. "SLUSA promotes uniformity to some degree by ensuring that covered class actions alleging securities fraud can only proceed under federal law, which is ultimately reviewable by [this] Court." *Fortunato*, 2016 WL 1734073, at *5. Concurrent jurisdiction "creates no significant danger of inconsistent application of federal [] law" where, as here, federal courts would "retain full authority and responsibility for the interpretation and application of federal [] law," not "bound by state court interpretations," and state

[8] Petitioners contend that the practical consequences of allowing concurrent jurisdiction for 1933 Act class action cases is having simultaneous cases in state and federal court – which they assert is "strange[]." Pet. 28. But parallel litigation is not an unusual feature of claims for which there is concurrent jurisdiction, and courts have various procedural mechanisms for adjudicating such cases. For example, as petitioners themselves note, state courts can stay the state court action in deference to a federal court action. *Id*. 28 n.27.

[9] *See also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (concurrent jurisdiction over Labor Management Relations Act § 301 suits despite federal enforcement and venue provisions); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (concurrent jurisdiction over 42 U.S.C. § 1983 suits, despite federal procedural provisions of § 1988).

courts would not only be "guided by federal court interpretations of the relevant federal [] statutes" but "[s]tate court judgments misinterpreting federal [] law would, of course, also be subject to direct review by this Court." *Tafflin*, 493 U.S. at 464-65. Indeed, "this Court's ability to review state court decisions of federal questions would sufficiently protect federal interests." *Merrill Lynch, Pierce*, *Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016).

Moreover, the mechanism Congress chose in enacting SLUSA was to extinguish a category of suits outright: it forbade class actions based on state law that were assertedly being used to evade the PSLRA. Those suits could not be pursued in either state *or* federal court. But petitioners read the Conforming Amendment to do something very different: to *maintain* suits under the 1933 Act, so long as they are filed in federal district court. Pet. 27. That reading of the statute – shifting only the *forum* of litigation, not the *form* of the claim – is inconsistent with SLUSA's basic design.

Any doubt is resolved by two settled principles of statutory construction. First, there is a "'deeply rooted presumption in favor of concurrent state court jurisdiction,'" that is rebuttable only if "'Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.'" *Mims v. Arrow Fin. Servs.*, *LLC.*, 132 S. Ct. 740, 748 (2012) (citation omitted). This Court's practice is to "read[] jurisdictional laws, so long as consistent with their language, to respect the traditional role of state courts in our federal system." *Manning*, 136 S. Ct. at 1567-68. The presumption of concurrent state court jurisdiction can therefore only 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." *Tafflin*, 493 U.S. at 460 (quoting *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473, 478 (1981)). The 1934 Act, for example, provides an express bar to concurrent jurisdiction over securities claims as opposed to the language of the Conforming Amendment to the 1933 Act.[10]

Second, when Congress designates a statutory provision a "conforming amendment" it is evidence of "legislative intent that the amendment should be read as a nonsubstantive reaction to related legislation." *Springdale Mem'l Hosp. Ass'n*, *Inc. v. Bowen*, 818 F.2d 1377, 1386 n.9 (8th Cir. 1987) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 381-82 (1981)); *see also Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting interpretation of statute that "would mean that Congress made a radical – but entirely implicit – change in the [legislation] . . . with [an amendment that] was merely one of numerous 'technical and conforming amendments' to the Farm Credit Act") (citation omitted). If Congress intended to provide for exclusive jurisdiction over class actions brought under the 1933 Act, it "would have said as much." *Rajasekaran*, 2014 U.S. Dist. LEXIS 124550, at *12-*15. It certainly would not have made such a significant change to state courts' long-standing concurrent jurisdiction over

[10] 15 U.S.C. § 78aa (1934 Act) ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter . . . , and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."); *see also Tafflin*, 493 U.S. at 471, (Scalia, J., concurring).

claims under the 1933 Act through a conforming amendment.

The "isolated snippets" of legislative history cited by petitioners, *Clovis*, 2016 WL 2592947, at *9 n.7, do not amount to an "unmistakable implication from legislative history" of a congressional intent to eliminate state courts' jurisdiction over claims under the 1933 Act. *Mims*, 132 S. Ct. at 748. SLUSA's first sentence states that its purpose is "[t]o amend the Securities Act of 1933 . . . to limit the conduct of securities class actions under State law." SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

Indeed, "[n]othing in SLUSA's text or the legislative history suggests that Congress intended to place roadblocks in the way of federal claims . . .; its only discernible intent was to preclude the use of the class-action device to prosecute certain state-law class action claims." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009). The overwhelming weight of SLUSA's legislative history thus demonstrates that "Congress . . . sought to curb the state law end-around [the PSLRA] by 'prevent[ing] state laws from being used to frustrate the operation and goals of the [PSLRA].'" *Clovis*, 2016 WL 2592947, at *9 (quoting S. Rep. No. 105-182 at 2); *see Unschuld v. Tri-S Security Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011, at *8 (N.D. Ga. Sept. 14, 2007) ("Congress was simply trying to preempt or preclude state law, *not state fora*, from being used in securities class actions.")

Finally, petitioners' argument cannot be reconciled with *Kircher*, 547 U.S. 633. *Kircher* held that under SLUSA an order remanding a securities class action to state court is not appealable. *Id.* at 640. In relevant part, the Court explained that the "authorization for

the removal in subsection (c)" is "confined to cases 'set forth in subsection (b)'" – *i.e.*, to those state law class actions precluded by SLUSA. *Id.* at 642 (citation omitted). In turn, except with respect to those precluded state law class actions, "the federal court . . . has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it." *Id.* at 643-44. Respondents' suit against petitioners under the 1933 Act contains no state law claim precluded by SLUSA. Directly contrary to petitioners' submission, *Kircher* concludes that a federal district court "has no jurisdiction" over the suit, which instead belongs in the California superior court "that can deal with it." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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