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 Court Of Appeal Of The State Of California, First Appellate District

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

A. To End the Chaos in the Lower Courts, This Court Should Settle the Question Presented

The need for this Court's review is now even more urgent. Just since May 2016, when the instant petition was filed, six new district court decisions have issued on the question presented.[1] Only days ago, the District of Delaware – where most U.S. companies are incorporated – deepened the lower-court conflict by ruling that state courts lack subject matter jurisdiction over '33 Act class actions.[2] Also since May, four new '33 Act class actions have been filed in California state court.[3] And thus far in 2016, more new decisions have issued, and more new class actions have been filed in California state court, than in all of 2015.[4] The split in the lower courts is growing, and the pace of forum-shopping is accelerating.

1. "Orwellian" is the only way to describe Respondents' assertion that the lower courts are not in chaos. Opp. 12-14.[5] Respondents ignore all of the conflicts described in the Petition. Pet. 11-13. Respondents argue that there is no *appellate* conflict (Opp. 12), but that argument makes *Petitioners'* point: the structural impediments to appellate review in both the federal

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[1] *See* Reply Appendix A.

[2] *See* Reply Appendix A. The other five decisions were to the contrary. *See id.*

[3] *See* Reply Appendix B.

[4] Pet. Appendices F, G, I; Reply Appendices A, B.

[5] *See* Opp. 11 ("little to no disagreement in the lower courts").

and state courts (Pet. 13-16) militate for, not against, a grant of certiorari. That conclusion is especially apt here, where dozens of district courts are issuing diametrically opposed holdings in the continuing absence of authoritative appellate guidance. Nor is appellate conflict a prerequisite for certiorari (Opp. 6, 14): Supreme Court Rule 10(c)'s first clause – invoked here (Pet. 10) – conspicuously requires *no* appellate conflict.

Also unavailing is Respondents' argument that a "'dominant view around the country'" has emerged.[6] The so-called "dominant view" may be prevalent in courts within the Ninth Circuit, but is almost uniformly rejected in courts within the Second and Third Circuits.[7] *Hung* (Pet. 30, 32-33) and the decision in Delaware this week dispose of any suggestion that recent case law uniformly supports Respondents (Opp. 12-14). The relatively large number of decisions by California courts results simply from the fact that, in recent years, more California-based companies have had IPOs than have companies based elsewhere. Opp. 15-16 & n.6 (citing Wilmer Hale, 2016 IPO Report).

Inexplicably, Respondents argue that "[n]othing about *Countrywide* would cause an increase in litigation" in California state court. Opp. 14. *Countrywide* unequivocally reopened the Reform Act's loophole that SLUSA had closed. Pet. 6-7, 25-26. Respondents argue that state courts have had jurisdiction over Section 11 claims since 1933 (Opp. 14), but, prior to the Reform

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[6] Opp. 12, 14.

[7] *See* Reply Appendix A; Pet. Appendices F, G.

Act, state-court litigation of any securities class action was a rarity. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). Although Respondents assert that "there were not even other appellate rulings around the country that would have inhibited such suits" (Opp. 14), the assertion ignores the suit-inhibiting effect of SLUSA itself (Pet. 5-8, 24-29).[8]

Respondents' argument that there are no impediments to federal appellate review cannot withstand scrutiny. Contrary to Respondents' suggestion (Opp. 11), a decision that grants remand in a '33 Act class action where (as here) a covered security is at issue is uniformly unappealable (Pet. 15 & n.19). The Ninth Circuit's decision in *Countrywide* is distinguishable for reasons (*see* Pet. 15 n.19, 20 n.28) ignored by Respondents. *Illinois Mutual Retirement Fund v. Citigroup, Inc.*, 391 F.3d 844, 848-49 (7th Cir. 2004), falls into the category of "irrelevant exceptions" to the bar to review of a remand order, 28 U.S.C. § 1447(d). *See* Pet. 13 & n.16. Respondents also ignore Petitioners' argument that review under 28 U.S.C. § 1292(b) is barred for decisions granting remand and is disfavored for decisions denying remand. Pet. 14-15. Respondents' suggestion that a decision denying remand can be reviewed after final judgment fails for the reasons discussed *infra* at A.2.

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[8] Respondents' attempt to blame the spike in California state-court filings on California's IPO boomlet fails. Respondents do not identify the number of California federal-court filings for the period before *Countrywide*, only for the period *after*. Opp. 15-16 & n.7.

Respondents' argument that there are no impediments to state appellate review is meritless. Contrary to Respondents' assertion (Opp. 9), forbidding obstacles deter defendants from getting another California appellate district to rule contrary to the *Countrywide* court (and thus to create an appellate conflict that might induce the California Supreme Court to grant review). In *every* superior court in California, *every* defendant in a '33 Act class action is required to litigate all the way to final judgment – and then appeal – before getting the *first* real opportunity to obtain a jurisdictional dismissal. Pet. 16 & n.21. Respondents so concede. Opp. 9. That requirement drastically reduces the chances of any California appellate court addressing the question presented, let alone deciding it contrary to *Countrywide*. *See* A.2., *infra*.[9] Nor is the present case "proof positive" that a defendant can readily obtain a decision in conflict with *Countrywide* from another California appellate court (Opp. 9-10): the Court of Appeal, First District (and, for that matter, the California Supreme Court) *denied* interlocutory review. If Petitioners must litigate to final judgment before they can obtain state appellate review of the question presented, it is unlikely that there will *ever*

[9] Even if a state's highest court decided that state courts have subject matter jurisdiction, a defendant sued thereafter in that state's trial court would still be entitled to remove, and the federal court would still be entitled to deny any remand motion. Thus, review by state appellate courts will neither resolve the federal-court split on the jurisdictional issue nor diminish the federal court's power to disagree with the state's highest court on that issue.

be such review, given the overwhelming likelihood – recognized by Congress and this Court – of settlement in securities class actions, *see* A.2., *infra*.[10]

Respondents' remaining policy arguments fail. The policy of avoiding piecemeal review of federal issues (Opp. 9) bows to the policy of granting certiorari where, as here, the federal issue not only is convulsing lower courts but also would evade review if the petitioners first had to litigate through discovery to final judgment and then appeal up through the state courts, *see A.2.*, *infra*.[11] The assertion that certiorari should not be granted absent a decision by the California Supreme Court (Opp. 8-9) ignores this Court's Rule 10(c), which authorizes this Court to review a decision of a "state court" – unlike Rule 10(b), which authorizes review of a decision of a "state court *of last resort.*" (Emphasis added.) The assertion also ignores this Court's decisions authorizing certiorari where, as here, the state's highest court declines review. Pet. 18-19.

2. Respondents' finality argument (Opp. 6-7, 11) is insidious. According to Respondents, certiorari should be unavailable until after Petitioners litigate

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[10] Contrary to Respondents' argument (Opp. 10), no other state's appellate court has decided the question presented. Nor do Respondents remotely suggest that other states host enough companies going through IPOs to create any significant body of '33 Act actions and appeals.

[11] *See Cox Broadcasting Corp. v. Cohn* ("*Cox*"), 420 U.S. 469, 478 n.7 (1975); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (relaxing jurisdictional requirements where issue was "capable of repetition, yet evading review").

through discovery to final judgment and then appeal through the state courts. But that position would make the decision below – and similar jurisdictional holdings – effectively unreviewable.

One of the evils that the Reform Act and SLUSA sought to eliminate from securities class actions was the "extortionate settlement[]." *Dabit*, 547 U.S. at 81; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); Pet. 5, 14 & n.18. Congress recognized that the threat of disproportionate and crushing liability was effectively a gun to the defendant's head, forcing settlement even in nuisance or meritless cases. *Dabit*, 547 U.S. at 81. Contrary to Respondents' suggestion (Opp. 7-8), the extortionate settlement endemic to securities class actions distinguishes this case from the ordinary case where a defendant loses a threshold dispositive motion and must await final judgment to appeal. Here, Congress not only identified such gun-to-the-head settlements as harming the national economy but also passed the Reform Act and SLUSA to eliminate them *and the concomitant deprivation of the defendant's day in court*. In the absence of the Reform Act's and SLUSA's protections (*e.g.*, in California state court), defendants in securities class actions would not await final judgment to appeal. Rather, they would be foreclosed – by extortionate settlements – from appeal altogether.

This Court's recent decisions in securities class actions are the proof. Of those decisions, *not one involved a final judgment entered after discovery*. All involved a

motion to dismiss, a motion to remand, or a motion for class certification.[12]

There is a special irony here. Not only has Congress's effort to eliminate the extortionate settlement – and to restore the defendant's day in court – been undone by California state courts in *Countrywide* and progeny. But the decisional law applied by those same courts now insulates *Countrywide* from appellate correction. *See supra* at 4; Pet. 16 & n.21. If Petitioners' jurisdictional challenge must await discovery, final judgment, and appeal for its first meaningful hearing, the extortionate settlement problem will almost certainly prevent the challenge from getting to that hearing, and hence to this Court. If *Countrywide* is not to be insulated from review, certiorari must be granted *now.*

Finally, Respondents misread *Cox*, 420 U.S. at 477, 482-83, as authorizing certiorari *only* where the party seeking review might prevail below on a "nonfederal" ground (and thus cause the federal issue to evade Supreme Court review). Opp. 7. *Cox* held that, under certain conditions (*e.g.*, where, as here, reversal of the decision below would preclude further litigation, and refusal to grant certiorari would seriously erode federal policy, *see* Pet. 17-18, 21), the possible disposition of the case in a manner that would cause the federal issue to evade Supreme Court review is a sufficient basis on which to grant certiorari. 420 U.S. at 482-83.

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[12] The 14 decisions issued since 2000 are listed in Reply Appendix C.

Although *Cox* cited, as such a possible disposition, a merits victory on a nonfederal issue by the party seeking review, *id.* at 482, *Cox*'s reasoning shows that other such review-evading dispositions would suffice to justify certiorari. Here, a settlement extorted by a plaintiff unbound by the Reform Act and SLUSA – a case outcome whose likelihood was recognized explicitly by Congress, *see Dabit*, 547 U.S. at 81, and by this Court in *Blue Chip Stamps*, 421 U.S. at 740 – and the consequent preclusion of further review is such a disposition.[13]

B. The Jurisdictional Question, Undisputedly Important, Was Wrongly Decided Below

On the merits, Respondents' main contention – that SLUSA's exception to Section 22(a)'s grant of concurrent state jurisdiction does not reference federal-law class actions (Opp. 16-17) – proves nothing. The exception also does not mention state-law class actions. That fact, even by Respondents' logic, demonstrates a congressional intent to exclude *federal-law*

[13] As to 28 U.S.C. § 1257(a)'s third prong (*see* Pet. 17 n.23, 19-20), Respondents' authorities are inapplicable, because they interpret only 28 U.S.C. § 1291, not 28 U.S.C. § 1257(a). Opp. 8 (citing cases). Because of "[s]pecial considerations of federalism," decisions interpreting each statute are not interchangeable. 16B Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4008, at 204 (3d ed. 2012). The terms "right" and "immunity" (*see* Pet. 19-20), which Respondents' authorities interpret, do not appear in § 1291. The capacious phrasing of § 1257(a) – "any title, right, privilege, or immunity" – indicates a far broader conception of finality than does the reading of the non-statutory terms "right" and "immunity" appearing in Respondents' cases.

class actions from concurrent state jurisdiction. As the Petition argued (Pet. 34-35), where Congress intended "covered class actions" to refer to state-law class actions, it added modifying language – see, for example, the phrase "covered class action[s] based upon [State law]" in Section 16(b). The unmodified use of "covered class actions" in Section 22(a) demonstrates that Congress intended to exclude at least federal-law class actions from concurrent state jurisdiction. *See* Pet. 34-35.

In any event, Respondents must concede that SLUSA's exception to Section 22(a)'s grant of concurrent state jurisdiction speaks broadly of "covered class actions," without expressly singling out *either* state-law *or* federal-law actions. This statutory breadth itself demonstrates a congressional intent to except *all* covered class actions from concurrent state jurisdiction.

Respondents are wrong when they assert that if Congress had wanted to create *exclusive jurisdiction*, it would have said so *in haec verba*. Opp. 17. There is no magic formula for a withdrawal of concurrent jurisdiction. Moreover, the bare term "exclusive jurisdiction" was not necessarily consistent with the delicate balance that the SLUSA Congress was trying to achieve: having covered class actions heard only in federal court *while preserving concurrent state jurisdiction over individual actions*. Pet. 7-8.

Respondents also misread the statutory evidence concerning Congress's purpose in enacting SLUSA.

Opp. 17. Petitioners have never disputed that *one* of Congress's goals was to limit state-law securities class actions. Pet. 7, 25. But Petitioners maintain – and Respondents fail to acknowledge – that *another* of Congress's goals was to bar federal-law securities class actions from being litigated in state *court*. Pet. 7, 25. As a preliminary matter, Respondents' quotation from SLUSA (Opp. 17, 21) is selective, omitting the italicized language in the phrase "An Act To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, *and for other purposes*." SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (emphasis added). In quoting from SLUSA, Respondents also omit Congress's "[f]inding[]" that "a number of securities class action lawsuits have shifted from Federal to State *courts*." *Id*. (emphasis added). This language does not limit the lawsuits at issue to those under state *law*. Respondents further fail to mention Congress's "[f]inding[]" that SLUSA's goal is "to prevent certain *State* private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [Reform Act]," which finding is not limited to lawsuits under state *law*. *Id.* (emphasis added).

Nor will the disuniformity, and consequent litigation abuses, spawned by the decision below (Pet. 5, 24-29) be sufficiently addressed by Supreme Court review following discovery, final judgment, and appeal through the state system. Opp. 18-19. Even apart from extortionate settlements foreclosing appeal, *see supra* at 6, Supreme Court review will never be more than a

mere possibility, because certiorari jurisdiction is discretionary. And the harm here is not the standard delay that intervenes between a complaint and a Supreme Court decision. Rather, the harm is the set of litigation abuses that will plague the *process* leading to a Supreme Court decision – abuses that, unlike ordinary litigation delay, Congress has expressly banned.

SLUSA's legislative history demonstrates that the intent underlying SLUSA's exception to concurrent state jurisdiction was to solve a problem not limited to state-*law* class actions: the problem was also state-*court* class actions, regardless of whether the claim was under state or federal law. The SLUSA Conference Report states that SLUSA made federal court the "*exclusive* venue for most securities class action lawsuits." Pet. 26 (quoting Conference Report) (emphasis added). The SLUSA Senate Report states that SLUSA was enacted to combat the "noticeable shift in class action litigation from federal to state *courts*." Pet. 29 n.39 (quoting Senate Report) (emphasis added). The same report clarifies that "[u]nder [SLUSA], certain class actions could not be based on state law *and could only be maintained in federal courts.*" Senate Report at 9-10 (emphasis added). The report also highlights "the Committee's intent that [SLUSA] be interpreted broadly to reach . . . *all* other procedural devices that might be used to circumvent the class action definition." *Id.* at 8 (emphasis added).

Respondents misplace reliance on *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (Opp. 18). *Tafflin* held that any *one* of three bases – explicit statutory text, unmistakable legislative history, or clear incompatibility between state jurisdiction and federal interests – is sufficient to establish the withdrawal of concurrent jurisdiction. *Id.* at 459-60. *Tafflin*'s discussion cited by Respondents (Opp. 18) concerned only the last ground. Here (contrary to Respondents' assertion, *see* Opp. 19-20), the first two grounds are each established. *See supra* at 8-10, 11; Pet. 7, 25, 30-36.[14]

Respondents' discussion of "conforming amendments" (Opp. 20-21) signifies nothing. The language of SLUSA's exception to concurrent jurisdiction in Section 22(a) cannot be ignored simply because a two-word non-codified heading in SLUSA labeled it a "conforming amendment." The "conforming" label does not strip a provision of substance. Indeed, this Court has expressly treated "conforming" amendments as substantive. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124, 134-35 (2008); *CBS, Inc. v. FCC*, 453 U.S. 367, 381 (1981). In particular, *Burgess* held that a "conforming amendment" does not mean that Congress "disavow[ed] any intent to make substantive changes" and that "[t]reating the amendments as non-substantive

[14] The third ground is also established here because of the desirability of uniform interpretation and because of federal courts' expertise in federal law and receptivity to federal statutory reforms. *See Tafflin*, 493 U.S. at 464.

would be inconsistent with their text." 553 U.S. at 134-35. The same is true here.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] Respondents selectively quote Petitioners' Petition for Review to the California Supreme Court, omitting the italicized language: "*The situation at present is that* Congress has left in place federal and state concurrent jurisdiction of claims under the Securities Act of 1933." *See* Opp. 4 (quoting only non-italicized portion). Far from conceding anything, Petitioners were merely describing the state of the law absent a decision overruling or distinguishing *Countrywide*.

REPLY APPENDIX A

Iron Workers Dist. Council of New England Pension Fund v. MoneyGram Int'l, Inc., No. 1:15-cv-00402-LPS, 2016 WL 4585975 (D. Del. Sept. 2, 2016) (state courts lack subject matter jurisdiction); *Westmoreland Cty. Emp. Ret. Fund v. Inventure Foods Inc.*, No. CV-16-01410-PHX-SMM, slip op. (D. Ariz. Aug. 10, 2016) (state courts have subject matter jurisdiction); *Rivera v. Fitbit, Inc.*, Nos. 16-cv-02890-SI, 16-cv-03381-SI, 2016 U.S. Dist. LEXIS 98202 (N.D. Cal. July 27, 2016) (same); *Pytel v. Sunrun Inc.*, Nos. C 16-2566-CRB, C 16-2568-CRB, C 16-02569-CRB, C 16-02570-CRB, C 16-02572-CRB, C 16-202573-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 11, 2016) (same); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 3002368 (D. Mass. May 23, 2016) (same); *Oklahoma Police Pension & Ret. Sys. v. Sientra, Inc.*, Nos. 5:15-cv-05549-EJD, 5:15-cv-05550-EJD, 5:15-cv-05553, 2016 U.S. Dist. LEXIS 67563 (N.D. Cal. May 20, 2016) (same).

REPLY APPENDIX B

NEW '33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS AFTER SLUSA

AFTER COUNTRYWIDE:

	Filing Date	Case Name	Case No.
1.	Sept. 1, 2016	Ramsay v. Pure Storage, Inc.	San Mateo County 16CIV01183
2.	Aug. 19, 2016	Jackie888, Inc. v. Tokai Pharmaceuticals, Inc.	San Francisco County CGC-16-553796
3.	Aug. 11, 2016	Bloom v. Goldman, Sachs & Co. (SunEdison, Inc.)	San Mateo County 16CIV00884
4.	Aug. 5, 2016	Torres v. Kryeziu (Code Rebel Corporation)	Los Angeles County BC629838

REPLY APPENDIX C

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1324 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1065 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 140-41 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36-37 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 252 (2010); *Merck & Co. v. Reynolds*, 559 U.S. 633, 643 (2010); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 155 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 317 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 638-39 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 76-77 (2006); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 340 (2005).