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 WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF OF *AMICI CURIAE* FEDERAL JURISDICTION AND SECURITIES LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

Amici are legal scholars who teach and write in the areas of federal jurisdiction and securities law.[1] Some *amici* teach in the field of federal jurisdiction, in which the presumption of concurrent state court jurisdiction over federal claims embodied in cases like *Tafflin v. Levitt*, 493 U.S. 455 (1990), is a crucial organizing principle. Others teach in the field of corporate and securities law, in which the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, play a prominent role.

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[1] Pursuant to Rule 37.3, counsel for *amici curiae* affirm that this brief has been filed with the written consent of the parties, which filed blanket consents with the Court. Pursuant to Rule 37.6, counsel for *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

of Law, where he teaches and writes about federal jurisdiction, civil procedure, and complex litigation.

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Amici submit this brief in an effort to bring their scholarly expertise to bear in a manner that will assist the Court. In so doing, *amici* act in their capacity as individual scholars, and not on behalf of their respective institutions.

SUMMARY OF ARGUMENT

Any doubt as to whether SLUSA preserved concurrent state court jurisdiction over federal securities claims under the Securities Act of 1933 should be resolved in accord with this Court's longstanding presumption in favor of concurrent state court jurisdiction. *See*, *e.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). That presumption reflects the basic structure of our judicial system, which decouples the law upon which a claim is based from the court that may hear that claim. As the Supremacy Clause makes clear, federal law is part of the binding law in every state, and the state courts generally have both the power and the obligation to hear claims based on that law in the absence of an affirmative act of Congress preempting their jurisdiction.

This longstanding presumption of concurrent jurisdiction is quite strong, and it can be overcome only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

Certainly SLUSA contains no such "explicit statutory directive"; its text excepts from concurrent jurisdiction only mixed complaints involving both state and federal claims. Petitioners instead rely on expectations voiced in the legislative history that SLUSA would centralize securities litigation in the federal courts, as well as Congress's general purpose to limit state court litigation of securities claims. But these are exactly the sorts of arguments that this Court has rejected before in cases like *Tafflin* and *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), as insufficient to overcome the presumption of concurrent jurisdiction.

The truth is that SLUSA, like most important federal statutes, reflects complex compromises and tradeoffs between a number of policies and values. Congress plainly allowed several significant classes of securities cases to remain in state court, reflecting that its general expectations and policies were qualified in certain circumstances. The best guide to those qualifications is the text Congress enacted, read against the background principle that concurrent state court jurisdiction endures unless explicitly withdrawn.

ARGUMENT

I. JURISDICTIONAL PROVISIONS OF SLUSA MUST BE EVALUATED IN LIGHT OF THE STRONG PRESUMPTION IN FAVOR OF CONCURRENT STATE COURT JURISDICTION OVER FEDERAL CLAIMS.

In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), this Court recognized "that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the

United States." This competence stems from the States' possession of "sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* This "deeply rooted presumption in favor of concurrent state court jurisdiction," *id.* at 459, is rebuttable only by clear evidence of Congress's intent to make federal jurisdiction exclusive, *see id.* at 459-60. As Part II demonstrates, no such showing can be made here. We begin, however, by exploring the nature of *Tafflin*'s presumption and its connection to the foundational postulates of our federal system.

Tafflin reflects a fundamental but perhaps counter-intuitive principle of our judicial federalism: Our legal system generally decouples the nature of the court that hears a case from the nature of the law governing that case. As the conferral of federal diversity jurisdiction makes clear, there is no presumption that only state courts must hear claims involving state laws. *See* U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1332. And as the longstanding *Tafflin* line of cases reflects, there is also no presumption that federal claims belong in federal court. *See Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 136-37 (1876).[2] Petitioners are thus wrong to urge that, simply because the Securities Act of 1933 ("1933 Act") is a federal statute, claims arising under that statute should be adjudicated in federal court. This argument flies in the face of both two centuries of jurisdictional history and the clear implications of the Supremacy

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[2] *See also* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 420-21 (7th ed. 2015); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383, 386-92 (1991).

Clause. The actual rule established by those sources, and recognized in this Court's precedents, is that state courts' concurrent jurisdiction can be preempted only by the clear and explicit intent of Congress.

A. THE HISTORICAL DEVELOPMENT OF FEDERAL JURISDICTION CONFIRMS THE BASELINE AUTHORITY AND OBLIGATION OF STATE COURTS TO HEAR FEDERAL CLAIMS.

The architects of our judicial system did not simply permit state courts to hear federal claims—they positively counted on the state courts to do so. Article III vested "[t]he judicial power of the United States" in the Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1, leaving, in effect, to Congress the decision whether and to what extent to create lower federal courts. This "Madisonian Compromise" presupposed that if Congress did *not* create lower federal courts, the state courts would stand open to hear federal claims. *See Hart and Wechsler*, *supra*, at 7-9, 296. The Compromise presupposed, in other words, that those state courts would be an adequate and appropriate forum for vindicating rights under federal law. Finally, "concurrent jurisdiction . . . flows from the obligations imposed upon states by the supremacy clause," Solimine, *supra*, at 404, which this Court has interpreted to require even unwilling state courts to hear federal claims, *see Testa v. Katt*, 330 U.S. 386, 389-90 (1947).

Although the First Congress did choose to create lower federal courts, it nonetheless relied on state courts as not simply an alternative but the *primary* forum for claims under federal law. "In the sphere of private civil litigation," the First Judiciary Act "made

no use of the grant of judicial power over cases arising under the Constitution or laws of the United States." *Hart and Wechsler*, *supra*, at 22. That Act did, however, implement diversity jurisdiction for cases involving parties from different states. *See id.* at 23. (Indeed, had the 1933 Act claims that trouble Petitioners been part of the U.S. Code in 1789, this Court would have lacked even *appellate* jurisdiction over successful plaintiffs' claims, as the Court's jurisdiction in federal question cases was limited to cases in which the state courts had *rejected* a federal claim. *See id.* at 25.) The First Judiciary Act, in other words, decoupled the nature of the case from the nature of the forum by providing for federal jurisdiction over a wide range of cases involving state (and other) laws while withholding jurisdiction over most federal claims in private civil cases.

This situation largely persisted until 1875. Although the outgoing Federalist party enacted a broad provision for federal question jurisdiction in 1801, following their electoral defeat in 1800, the incoming Jeffersonian Republicans promptly repealed that provision in 1802. *See Hart and Wechsler*, *supra*, at 26-27. For most of the Nineteenth Century, then, state courts were not simply available to hear federal claims; they were the only game in town. General federal question jurisdiction did not return until the Reconstruction Congress included it in the 1875 Judiciary Act; that Act thus critically provided a federal forum to enforce Reconstruction's expansion of federal substantive rights (in the Thirteenth, Fourteenth, and Fifteenth Amendments) and federal remedies (especially in 42 U.S.C. § 1983). One need not downplay the importance of the right to a federal forum when a plaintiff wishes to pursue a federal claim there to insist on the continuing importance of

concurrent jurisdiction in state court. To this day, for example, state courts hear a large number of § 1983 claims, *see* Solimine, *supra*, at 413-19,[3] and this Court has considered it of great importance to ensure that they do so, *see*, *e.g.*, *Haywood v. Drown*, 556 U.S. 729, 731 (2009); *Howlett v. Rose*, 496 U.S. 356, 375-81 (1990).

The critical point is simply that "[c]oncurrent jurisdiction [over federal claims] has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). Article III and the Madisonian Compromise presupposed this concurrency, and the actual implementation of the judicial power by Congress has vindicated that expectation. Significantly, the 1933 Act fell squarely into this tradition of concurrent jurisdiction.

B. THE AUTHORITY OF STATE COURTS TO HEAR FEDERAL CLAIMS DERIVES FROM THE STATES' FUNDAMENTAL ROLE IN THE FEDERAL SYSTEM.

It is important to establish *why* state courts presumptively may hear federal claims in order to understand the sort of act required to displace that presumption. State courts can hear federal claims because they are part of the same legal system. As this Court said in *Claflin*, 93 U.S. at 136-37, "[t]he laws of the United States are laws in the several States, and

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[3] *See also* 1 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 1.1 (2008) ("State courts . . . emerged in the latter decades of the twentieth century as the forum of choice for an increasing number of plaintiffs . . . under 42 U.S.C.A. § 1983.").

just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other[.]" More than a century later, this Court elaborated:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, 496 U.S. at 367. Alexander Hamilton said as much in Federalist 82, observing that "[w]hen . . . we consider the State governments and the national governments . . . in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

This is why, for example, state courts are not free to *decline* to hear federal statutory causes of action. *See*, *e.g.*, *Testa*, 330 U.S. at 389-90 (observing that the Supremacy Clause obligates the state courts to treat federal law as their own law). And it follows, as Justice Scalia explained in *Tafflin*, that it "takes an

affirmative act of power [by Congress] under the Supremacy Clause to oust the States of jurisdiction—an exercise of . . . 'the power of congress to *withdraw*' federal claims from state-court jurisdiction." *Tafflin*, 493 U.S. at 470 (Scalia, J., concurring) (quoting *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820)) (emphasis added in *Tafflin*). Hearing federal claims in state court is no more unusual, and no more dependent on some preexisting authorization from Congress, than any other activity in which state governments may engage. Withdrawal of federal claims from state court is thus an act of federal *preemption*, displacing an otherwise legitimate state governmental action by a clear exercise of congressional power. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). As we elaborate further below, *Tafflin*'s requirement of clear evidence that Congress intended to displace concurrent state court jurisdiction over federal claims is simply a particularly forceful embodiment of *Rice*'s presumption against preemption.

II. *TAFFLIN V. LEVITT*'S PRESUMPTION OF CONCURRENT STATE COURT JURISDICTION OVER FEDERAL CLAIMS CONTROLS THIS CASE.

Tafflin stated that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." 493 U.S. at 459-60 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). Although a strong argument can be made for discounting the second and third *Gulf Offshore*

factors, *see* Solimine, *supra*, at 401-13, this case can easily be resolved in favor of concurrent jurisdiction by applying the *Gulf Offshore* test as it stands.

A. SLUSA CONTAINS "NO EXPLICIT STATUTORY DIRECTIVE" WITHDRAWING STATE COURT JURISDICTION OVER 1933 ACT CLAIMS.

As Respondents' Brief explains, the most straightforward reading of SLUSA would not withdraw the state courts' longstanding concurrent jurisdiction over federal claims under the 1933 Act. *See* Resp. Br. 11-14. That Act, since its enactment, has provided for concurrent jurisdiction in a particularly emphatic form. Not only did Section 22 of the Act provide for federal court jurisdiction "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," Act of May 27, 1933, ch. 38, tit. I, § 22, 48 Stat. 86, codified at 15 U.S.C. § 77v, but it also prohibited removal of such cases from state to federal court, *id.* In SLUSA, Congress amended § 77v by qualifying both provisions: It made state jurisdiction concurrent "except as provided in section 77p of this title with respect to covered class actions," Pub. L. No. 105-353, tit. I, § 101(a)(3), 112 Stat. 3230 (1998), and it prohibited removal "[e]xcept as provided in section 77p(c) of this title," *id.*

As amended in § 101(a)(1) of SLUSA, 112 Stat. 3227, Section 77p restricts only class actions "based upon the statutory or common law of any State or subdivision thereof," 15 U.S.C. § 77p(b). Hence, the only "exceptions" that § 77p "provided" were those concerning class actions based on state law. As a result, SLUSA carved out a particular set of class

actions—*mixed* complaints including both state and federal 1933 Act claims—that otherwise would have fallen within § 77v's provision for concurrent jurisdiction. But it said nothing about class actions raising only 1933 Act claims, because § 77p does not deal with such claims at all. Similarly, SLUSA amended § 77v's prohibition on removal only insofar "as provided in section 77p(c)," which likewise explicitly confines its effect to class actions based on state law by referencing subsection 77p(b).

To the extent that any of this is ambiguous, *Tafflin*'s presumption removes any doubt. Petitioners' argument is that § 77v should be read, as amended, to except all "covered class actions" as defined in § 77p(f)(2), regardless of whether they involve state or federal law claims. But § 77v does not point to § 77p(f)(2) or incorporate simply that subsection's definition of covered class actions; rather, § 77v incorporates the substance of § 77p more generally. That substance is simply to restrict covered class actions when they rely on state law. Certainly, there is no "explicit statutory directive" in either § 77v or § 77p restricting the state courts' longstanding concurrent jurisdiction over 1933 Act claims.[4]

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[4] Given the longstanding nature of that jurisdiction, Petitioners' argument also runs up against the presumption against repeals by implication. *See*, *e.g.*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007) ("'[R]epeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'") (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). That is particularly true when statutes affecting the allocation of jurisdiction between state and federal courts are concerned. *See*, *e.g.*, *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1874).

Petitioners seem to think that *Tafflin*'s presumption is rebutted by the fact that SLUSA did incorporate *some* restriction on state courts' jurisdiction. *See* Pet. Br. 38. But the fact that Congress plainly wanted to extend its prohibition of state-law class actions brought in state court to those pleaded along with 1933 Act claims (and to avoid any conflict between the anti-removal provision in § 77v and the provision for removal in § 77p(c), *see* Resp. Br. 12-13), says nothing about whether Congress wanted to eliminate concurrent jurisdiction over 1933 Act claims themselves. SLUSA simply does not say what to do with those claims when they are brought in state court. Petitioners' argument, in essence, is that this Court should fill this lacuna in light of some general imputed purpose to get securities litigation out of state court. But that sort of inference is precisely what *Tafflin*'s insistence on an "explicit statutory directive" forbids.

In any event, this Court has made clear that *Tafflin*'s presumption is not limited to the question whether Congress seeks to withdraw *any* of the state courts' jurisdiction over federal claims. Rather, the presumption also extends to any ambiguities concerning the *scope* of any such withdrawal that Congress might choose to make. Just two terms ago, this Court rejected the proposition that "this Court's concern for state court prerogatives disappear[s] . . . in the face of a statute granting exclusive federal jurisdiction. . . . To the contrary, when a statute mandates, rather than permits, federal jurisdiction—thus depriving state courts of all ability to adjudicate certain claims—our reluctance to endorse broad reading[s], if anything, grows stronger." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (internal quotation omitted). Significantly, *Claflin*, 93 U.S. (3 Otto) 130—generally

considered the seminal case for the presumption of concurrent jurisdiction—involved just such a situation. In that case, the defendant argued for exclusive federal jurisdiction over suits by assignees in bankruptcy precisely because Congress had clearly conferred exclusive jurisdiction over bankruptcy cases upon the federal courts. *See id.* at 132. But the Court nonetheless applied a strong presumption of concurrent jurisdiction in concluding that this exclusivity did not extend to suits by bankruptcy assignees. *See id.* at 136.

The same point is evident in this Court's preemption jurisprudence. Because the states have independent authority to hear federal claims, based on their status as coordinate sovereigns bound by federal law, SLUSA raises a question of preemption: Did Congress intend to preempt the states' ability to hear 1933 Act claims?[5] A general presumption against preemption governs such questions, especially in areas—like concurrent jurisdiction under the 1933 Act—of longstanding state activity. *See Rice*, 331 U.S. at 230. And while there has been debate on the question, this Court's most recent decisions generally hold that even where Congress includes an explicit statutory preemption clause, the presumption against preemption governs ambiguities regarding that clause's scope. *See*, *e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188-89 (2014) (plurality opinion); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Bates v. Dow Agrosciences LLC*, 544

[5] This Court has explicitly rejected arguments that state courts' concurrent jurisdiction over federal claims is grounded in some sort of implicit grant of authority from Congress. *See Howlett*, 496 U.S. at 370 n.17 (rejecting claim that "the obligation of state courts to enforce federal law rests, not on the Supremacy Clause, but on a presumption about congressional intent").

U.S. 431, 449 (2005).[6] Similarly, in choosing between "plausible alternative reading[s]" of § 77v in the present case, this Court has "a duty to accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449.

B. SLUSA'S LEGISLATIVE HISTORY CONTAINS NO "UNMISTAKABLE IMPLICATION" FORECLOSING STATE COURT JURISDICTION OVER 1933 ACT CLAIMS.

This Court has never found the *Tafflin* presumption to be rebutted based on legislative history alone. *See Tafflin*, 493 U.S. at 472 (Scalia, J., concurring).[7] Indeed, this Court has said more recently that "[s]o strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction . . . and second, '[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.'" *Haywood*, 556 U.S. at 735 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916), and *Claflin*, 93 U.S. at 136; and quoting *Howlett*, 496 U.S. at 372). There is no express ouster here, and this Court has never read *Tafflin*'s consideration of legislative history to permit litigants

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[6] *See also* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 272-73 (2012).

[7] *See also id.* ("[O]ne can hardly imagine an 'implication from legislative history' that is 'unmistakable'—*i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the proposition is embodied in statutory text to which those parties have given assent.").

seeking to avoid state court to make, so to speak, something out of nothing.[8]

Freestanding legislative history is not law, of course. Committee reports and statements by legislators are not voted on by both houses and presented to the President, *cf. INS v. Chadha*, 462 U.S. 919, 956-58 (1983) (insisting on these prerequisites for congressional action with the force of law). Much of Petitioners' legislative history evidence consists of views expressed by single legislators, but this Court has said that "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012). And legislative history is notoriously susceptible of manipulation or mistake. For example, some of SLUSA's legislative history is demonstrably inconsistent with what the statutory text actually does. *See*, *e.g.*, Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. Cin. L. Rev. 349, 375 (2012) (noting that the Conference Report says Congress intended that the "Delaware carve-out" would be limited to suits filed in state court in the defendant's state of incorporation, but that SLUSA's text lacks this limit and courts have unanimously concluded that it does not exist).

In any event, this Court has rejected the very sort of legislative history argument that Petitioners advance here. In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), proponents of

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[8] *See*, *e.g.*, *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) ("Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.").

exclusive federal jurisdiction over Title VII claims submitted extensive legislative history evidence from a broad range of actors expressing the expectation that Title VII enforcement would be centered in federal court. This Court flatly—and unanimously—rejected that evidence as insufficient. "[W]ithout disagreeing with petitioner's persuasive showing that most legislators, judges, and administrators who have been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that such litigation would be processed exclusively in federal courts," Justice Stevens wrote, "we conclude that such anticipation does not overcome the presumption of concurrent jurisdiction that lies at the core of our federal system." *Id.* at 826.

C. THERE IS NO "CLEAR INCOMPATIBILITY BETWEEN STATE COURT JURISDICTION" OVER 1933 ACT CLAIMS "AND FEDERAL INTERESTS."

The heart of Petitioners' argument—and that of their *amici*—is that making federal jurisdiction over 1933 Act claims exclusive would be the best way to further the broad policy goals of not only SLUSA but also the PSLRA. Such policy arguments have never been sufficient under *Tafflin*, and they should not be so here. Moreover, it seems likely that Petitioners and their *amici* have imputed their own policy preferences to Congress. SLUSA's text clearly reveals an intricate compromise between any number of potentially conflicting policy goals—not, as Petitioners insist, a single-minded demand for cutting state courts out of securities enforcement.

1. POLICY ARGUMENTS BASED ON BROAD FEDERAL INTERESTS SHOULD NEVER BE ENOUGH TO EXCLUDE STATE COURT JURISDICTION.

In the early days of this Court's concurrent jurisdiction jurisprudence, some decisions seem to have relied on implicit conflicts with federal policy as a basis for exclusive federal jurisdiction, even in the absence of an explicit statutory directive. *See* Solimine, *supra*, at 387-88. These cases tended not to discuss *Claflin*, which had articulated a strong presumption favoring concurrency, or to offer much in the way of explanation at all. *See*, *e.g.*, *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 (1943) (concluding—with no discussion whatsoever—that state courts lack concurrent jurisdiction over antitrust cases). But at least since *Dowd Box*, 368 U.S. 502, much more than that has been required. *See* Solimine, *supra*, at 388-92. Hence, Justices Scalia and Kennedy were able to conclude in *Tafflin* that the notion that "this Court [may] exclude state-court jurisdiction when systemic federal interests make it undesirable . . . has absolutely no foundation in our precedent." 493 U.S. at 472 (Scalia, J., concurring).

Given that withdrawal of federal jurisdiction from the state courts requires a preemptive act by Congress, *Gulf Offshore*'s notion of "clear incompatibility" corresponds to the "purposes and objectives" branch of this Court's preemption jurisprudence. That branch suggests that preemption occurs whenever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The pitfalls of this sort of analysis are well-known, however. As Justice Thomas has argued, "[t]his brand of the Court's pre-emption jurisprudence

facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law." *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in the judgment); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 907-08 (2000) (Stevens, J., dissenting) (describing the purposes and objectives doctrine as "potentially boundless (and perhaps inadequately considered)"). In particular, the "desire to divine the broader purposes of the statute before [the court] inevitably leads it to assume that Congress wanted to pursue those policies 'at all costs'—even when the text reflects a different balance." *Wyeth*, 555 U.S. at 601.

As we argue below, SLUSA reflects just such a balance among competing imperatives. To be sure, Congress sought in the PSLRA and SLUSA to make securities class actions more difficult to prosecute and to consolidate many of them in federal court. But Congress also incorporated many exceptions and qualifications to these objectives, and these textual nuances should not be lost by generalized appeals to broad policy imperatives. This is yet another case in which "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

2. CONSTRUING SLUSA TO PRESERVE STATE COURT JURISDICTION OVER 1933 ACT CLAIMS WILL NOT UNDERMINE FEDERAL INTERESTS IN UNIFORMITY.

Petitioners and their *amici* impute to Congress an overwhelming purpose to secure uniformity—with

respect to both the substance of federal securities law and the procedures by which it is enforced. *See* Resp. Br. 11-12, 37; Brief of *Amici Curiae* Law Professors in Support of Petitioners ("Professors' Br.") 4. But uniformity arguments have not fared particularly well under *Tafflin*. It bears emphasis that in that case, the arguments for uniformity were quite strong. Proponents of exclusive jurisdiction over civil RICO claims urged that, because RICO incorporated federal crimes as predicate acts, concurrent jurisdiction over RICO claims would lead to the inconsistent application of federal criminal laws. Those proponents also argued that state court jurisdiction would undermine particular procedural mechanisms that Congress had built into the RICO statute, but which only operated in federal court. The Court nonetheless flatly—and unanimously—rejected these arguments.

The *Tafflin* Court's reasons for rejecting these arguments are instructive because they are equally applicable here. The Court emphasized that federal courts "would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts," and that "[s]tate courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state laws." *Tafflin*, 493 U.S. at 465. Both of those things are true here, and neither Petitioners nor their *amici* have pointed to any systematic evidence that the state courts have substantively diverged from federal court interpretations of the 1933 Act.[9]

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[9] Although Petitioners' *amici* emphasize that state courts are not bound by decisions of lower federal courts, Professors' Br. 17,

Petitioners' *amici* do cite two instances in which similar circumstances led to different results in state and federal court. *See* Professors' Br. 21-24. The plural of "anecdote," however, is not "data": two data points tell us little, if anything, about whether such divergences are widespread. There is no indication that the state and federal courts in either instance interpreted the relevant federal legal standards differently, rather than simply reaching divergent applications of the law to a particular set of facts. One could no doubt find similar instances of divergence under similar circumstances between courts *within* the federal system. Moreover, it is unclear why the ordinary rules of *res judicata* and collateral estoppel, which traditionally check this sort of duplicative litigation of the same facts, were inadequate in these instances. Finally, as *Tafflin* emphasized, this Court retains jurisdiction to review and correct egregious instances of inconsistent administration of federal law by the state courts. *See* 493 U.S. at 465. To conclude that state courts are simply incapable of consistently applying federal legal standards would "not only denigrate the respect accorded coequal sovereigns, but would also ignore our 'consistent history of hospitable acceptance of concurrent jurisdiction.'" *Id.* at 466 (quoting *Dowd Box*, 368 U.S. at 508).

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they fail to acknowledge widespread deference to those decisions—even in California. *See*, *e.g.*, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000) ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. . . . [W]here the decisions of the lower federal courts on a federal question are both numerous and consistent, we should hesitate to reject their authority.") (internal quotations and citations omitted).

Tafflin also made short work of arguments for procedural uniformity. Noting that "RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court," the Court nonetheless observed that "we have previously found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms." 493 U.S. at 466 (citing *Dowd Box*, 368 U.S. at 508 (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions), and *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (finding concurrent jurisdiction over 42 U.S.C. § 1983 suits, despite federal procedural provisions in § 1988)).[10] Acknowledging that "congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction," the Court concluded that "it does not by itself suffice to create a 'clear incompatibility' with federal interests." *Id.* at 466-67.

In any event, SLUSA hardly evinces a preference for uniformity "at all costs"—either as a matter of substance or procedure. For example, § 77p(d)(1)—the famous "Delaware carve-out"—preserved not only state court jurisdiction but also state law claims where a suit is based on the law of the state in which the issuer is incorporated. This has turned out to be the largest category of post-SLUSA class actions in state court by a considerable margin. *See* Johnson, *supra*, at 373-74. Even more subversive of substantive

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[10] *See also Yellow Freight*, 494 U.S. at 825-26 (rejecting the availability of special procedures available in federal court litigation under Title VII as a reason for denying concurrent state court jurisdiction).

uniformity, SLUSA precludes suits based on state law only if they take the form of class actions—not if they involve a small number of litigants. 15 U.S.C. § 77p(d)(1)(A). This legislative choice is hardly consistent with a desire to keep state courts from construing and applying the 1933 Act. And it leaves open the possibility, for example, that large institutional investors may avoid the PSLRA's strictures by suing individually or in small groups in state court. *Cf. id.* § 77p(f)(2)(A).

SLUSA's commitment to procedural uniformity is likewise qualified by significant compromises. Petitioners do not deny, for instance, that large institutional investors could bring 1933 Act claims in state court and might well have incentives to do so. Likewise state governmental authorities are expressly authorized to bring suits in state court on behalf of themselves or state pension plans. *See id.* § 77p(d)(2). *Cf. generally* Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America* (2015) (noting the rise of litigation by state governments seeking to impose regulatory settlements on national industries). And if Congress had really sought uniformity above all other values, it would have committed securities litigation to public officials or centralized the cases in a single federal court rather than leaving it subject to the inevitable variation that even exclusive jurisdiction in federal courts permits. *See Tafflin*, 493 U.S. at 465 (suggesting that "state court adjudication of civil RICO actions . . . will not, in any event, result in any more inconsistency than that which a multimembered, multi-tiered federal judicial system already creates").

The bottom line is that SLUSA is a complex statute reflecting a variety of both substantive and

procedural compromises. Congress balanced not only uniformity and the need to protect vulnerable defendants, but also a desire to preserve traditional state primacy over the law of corporate governance, the enforcement prerogatives of state executive officials, the convenience of individual litigants, and the need to ensure vigorous enforcement of federal securities laws in appropriate cases. *Cf. id.* at 467 (noting that "far from disabling or frustrating federal interests, '[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights'") (quoting *Gulf Offshore*, 453 U.S. at 478 n.4). The general purpose of Congress to enhance the uniformity of federal securities enforcement does not establish that it did not qualify that purpose by preserving the benefits of traditional concurrent state court jurisdiction in 1933 Act cases. Given that Congress legislated against the clear background of this Court's presumption of concurrent jurisdiction in *Tafflin* and similar cases, Congress's decision not to explicitly and clearly exclude state court jurisdiction over such cases should be interpreted as just such a qualification—not some sort of mistake.

3. PETITIONERS' *AMICI* DO NOT PRESENT COMPELLING EVIDENCE OF A DISPARITY BETWEEN STATE AND FEDERAL COURTS.

In addition to citing two instances in which federal and state courts have reached divergent results in similar circumstances, Petitioners' *amici* also purport to demonstrate that the state courts are systematically more receptive to class action lawsuits by securities plaintiffs. *See* Professors' Br. 19-25. This is an attack on the general notion of "parity" between state and federal courts, and it implicates one of the most difficult empirical questions in the law of federal

jurisdiction. *See generally Hart and Wechsler*, *supra*, at 299-300. It is, for example, impossible to demonstrate whether federal or state courts are more likely to apply federal law "correctly" without agreeing on what the right answer was, in fact, in each of the cases in the data set. *See id.* at 299 (suggesting that "[t]he answer to [this framing of the parity] question is bound up with normative issues . . . that are not subject to empirical measurement."). Other studies have asked—as Petitioners' *amici* do—whether particular kinds of federal claims are more likely to be successful in state or federal courts. But here it is critical to compare apples to apples; a higher success rate for federal plaintiffs in one forum or the other would be meaningless unless we know that the federal claims in each set were of largely equivalent merit and litigated with equivalent resources and skill. *See id.* at 300. It is not surprising that one leading review of the empirical literature on parity concluded that "[a]lthough parity is an empirical question, no empirical answer seems possible." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 273 (1988).

Against this general background, it is critical to recognize that Petitioners' *amici* have not presented an actual *study* of securities litigation in state and federal court. Rather, they have selected a particular jurisdiction—California—and simply reported that dismissals are less common and settlements more frequent in that jurisdiction over a particular time period than in federal court. There is no indication whether California is typical of other states in this regard, and no attempt to explain *why* the disparate

pattern exists.[11] Nor is there any apparent effort to control for other variations in the sample that might prevent an apples-to-apples comparison of the claims in state and federal court.

Finally, it is worth noting that Petitioners' attack on state/federal court parity is profoundly counter-intuitive. Parity skeptics have generally asserted that, for a variety of reasons, state courts are likely to be unduly hostile to federal claims. *See*, *e.g.*, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1997). The claim that Petitioners make here—that state courts are unduly *sympathetic* to the assertion of plaintiffs' rights under the federal securities laws—surely requires a much more compelling demonstration than Petitioners or their *amici* have made so far. That is especially true given this Court's refusal to consider challenges to parity as a reason to deny concurrent state court jurisdiction even in settings where there are considerably more intuitive reasons to doubt that it exists. *See*, *e.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (finding that state courts have concurrent jurisdiction over § 1983 cases).

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[11] Petitioners' *amici* do suggest that the plaintiffs' bar, perceiving that California is unusually sympathetic to securities claims, has taken to filing cases in California that have little connection to the state. Professors' Br. 20-21. If this were true, then perhaps it would not matter if states are not *generally* more sympathetic to securities claims, as cases would migrate to the most sympathetic state forum. But this Court's tightening of personal jurisdiction requirements ought to restrict this sort of forum shopping to a significant degree. *See*, *e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017).

CONCLUSION

The judgment of the Court of Appeal of the State of California, First Appellate District should be affirmed.

Respectfully submitted,

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