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 INSTITUTIONAL INVESTORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici consist of fiduciary entities charged with the responsibility for administering more than $3.5 billion in pension fund and other employee benefit plan assets ("Funds") on behalf of more than 16,000 beneficiaries. As part of their duties to protect the value of the Funds entrusted to their care, *amici* have participated in class-action lawsuits (including class actions under the Securities Act of 1933 brought in state court) seeking to recover damages from securities issuers that have violated federal securities laws and caused losses to their Funds. Because *amici* manage the retirement benefit assets of civil servants, *amici* have a longstanding institutional interest in preserving the rights that investors historically have had in choosing to bring actions asserting only claims under the Securities Act of 1933 in either federal or state court.

Amici consist of the following:

Westmoreland County Employee Retirement System;

Oklahoma Police Pension and Retirement System; and

Bucks County Employees' Retirement System and Trust.

Respondents ably demonstrate in their brief why the straightforward meaning of the relevant statutory

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

text warrants affirmance here. *Amici* support respondents' arguments in full. *Amici* write separately to expand on another point: to show that – even assuming that the statutory text alone were not dispositive in favor of respondents' interpretation – the legislative history leading up to the amendments made by the Securities Litigation Uniform Standards Act of 1998 supports affirmance.

INTRODUCTION AND SUMMARY

When Congress enacted the Securities Act of 1933 ("1933 Act"), it determined that allowing investors to sue in state court would best serve that statute's scheme of private enforcement. The strict-liability cause of action that the 1933 Act created mirrored many States' then-existing "blue-sky laws" that protected purchasers of securities from public offerings based on false or misleading registration statements. Congress thus recognized state courts' concurrent jurisdiction to hear 1933 Act claims, and it rejected subsequent attempts to strip state courts of that jurisdiction. For the first 65 years after Congress passed the 1933 Act – including for decades after the first securities class actions in the late 1930s[2] – investors' ability to bring 1933 Act claims in state court was unquestioned.

This case presents the question whether Congress, in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), intended to upend that framework by divesting state courts of their long-held jurisdiction to hear state-court class actions asserting only 1933 Act claims. Respondents have persuasively

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[2] *See, e.g.*, *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (upholding issuance of temporary injunction in 1933 Act class action).

demonstrated that Congress had no such intent. *Amici* write to amplify those points and to explain in greater detail why SLUSA's legislative history evinces Congress's intent not to eliminate state-court jurisdiction over 1933 Act class actions, but instead to prevent plaintiffs from evading federal law by asserting *state-law* securities claims in state court.

The legislative debates surrounding SLUSA focused on a narrow set of problems that state-court actions alleging only 1933 Act claims do not implicate. Those problems stemmed primarily from plaintiffs' evasion of federal standards for pleading securities-fraud claims under the Securities Exchange Act of 1934, the circumvention of federal safe-harbor rules, and the use of state-law claims to bypass the federal discovery stay. Those problems were unique to state-law securities claims and did not arise in state-court actions asserting exclusively 1933 Act claims (which are predicated on strict liability for misstatements in offering materials, rather than fraud). For that reason, there is no evidence in SLUSA's legislative history that Congress was concerned with state courts' exercise of concurrent jurisdiction over 1933 Act claims. Indeed, a bill was introduced in Congress in 1997 that would have explicitly stripped state courts of their 1933 Act jurisdiction, but Congress declined to adopt it. Congress did not intend SLUSA to accomplish indirectly what that failed jurisdictional bill would have done directly.

Further, petitioners' contrary reading of SLUSA's legislative history is unpersuasive. Read in context, the snippets of legislative history that petitioners identify merely demonstrate Congress's general concern with the use of state-court class-action litigation to evade federal securities law. That concern is inapplicable to 1933 Act claims and does not suggest

that Congress intended SLUSA to overhaul decades of state-court jurisdiction over such claims. If anything, the parts of the legislative history cited by petitioners reinforce that SLUSA was not aimed at state-court class actions asserting exclusively 1933 Act claims.

ARGUMENT

I. WHEN SLUSA WAS ENACTED, STATE COURTS HAD POSSESSED CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS FOR MORE THAN 60 YEARS

Congress's purpose in enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[3] is best understood in light of the decades-long history of the two primary federal securities statutes, from 1933 and 1934, that SLUSA amended.[4] That history begins with the Securities Act of 1933 ("1933 Act").[5]

The 1933 Act. From its very inception, the 1933 Act recognized state courts' concurrent jurisdiction over private suits brought under the robust civil-liability provisions it enacted. As President Franklin D. Roosevelt explained, the 1933 Act was designed to "bring back public confidence" in securities offerings by "put[ting] the burden of telling the whole truth on the seller" in such offerings. President of the United States, Federal Supervision of Traffic in Investment Securities, H.R. Doc. No. 73-12, at 1 (1933) (President Roosevelt's message to Congress). The 1933 Act

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[3] Pub. L. No. 105-353, 112 Stat. 3227 (1998).

[4] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (interpreting statute based in part on "legislation that Congress ha[d] enacted over the past 35 years").

[5] Act of May 27, 1933, ch. 38, tit. I, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.*).

implemented that objective not only by giving the Federal Trade Commission ("FTC") enforcement authority against issuers that made misstatements in their offering documents, *see* 1933 Act §§ 2(5), 20, 48 Stat. 75, 86, but also by creating civil-liability provisions allowing injured investors to file private causes of action, *see id.* §§ 11, 12, 48 Stat. 82-84. Those civil-liability provisions were essential to the 1933 Act's original design.[6]

The 73d Congress determined that the 1933 Act's scheme of civil liability would work best if investors had the choice of suing in state court. That determination reflected the parallels between the 1933 Act and existing state "blue-sky laws." Many States had enacted such laws to impose civil liability for misstatements appearing in offering documents,[7] but

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[6] *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 83, 587 & n.45 (1982) ("Without the stringent civil liability sections, . . . the FTC would not have been able to compel firms attempting to sell securities to the public to acknowledge 'such facts as the pendency of damaging litigation' or the existence of 'outstanding liabilities, misleading accounting practices, . . . and the like.'") (quoting Letter from James M. Landis to President Franklin D. Roosevelt (Dec. 4, 1933)); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 35 (1959-1960) ("We were particularly anxious through the imposition of adequate civil liabilities to assure the performance by corporate directors and officers of their fiduciary obligations and to impress upon accountants the necessity for independence and a thorough professional approach.").

[7] *See*, *e.g.*, Act of July 1, 1912, No. 40, 1912 La. Acts 47; Act of Aug. 21, 1913, 33d Leg., 1st C.S., ch. 32, § 6, 1913 Tex. Gen. Laws 66, 68-69; Ohio Rev. Code § 6373.18 (1915); Act of Apr. 3, 1916, ch. 97, § 6, 1916 Miss. Laws 87, 91; Act of Mar. 22, 1919, ch. 49, § 4, 1919 Okla. Sess. Laws 77, 80; Act of Sept. 29, 1919, No. 660, § 3, 1919 Ala. Laws 946, 949.

issuers were avoiding liability under those laws "by establishing an office in one State and selling across State lines to people in other States under protection of interstate commerce." 77 Cong. Rec. 2935 (1933) (statement of Rep. Virgil Chapman).

Congress sought to curtail that behavior by creating national federal regulation of securities offerings in the 1933 Act. In doing so, it recognized that state-court jurisdiction would best comport with the tradition of state "blue-sky laws" upon which it intended the 1933 Act to improve. The 1933 Act thus included section 22(a), which recognized state courts' concurrent jurisdiction over all 1933 Act claims and barred defendants from removing to federal court actions asserting exclusively such claims. 1933 Act § 22(a), 48 Stat. 86-87 (codified as amended at 15 U.S.C. § 77v(a)). Due to section 22(a), as one Congressman explained at the time, "[c]ases under the [1933] act may be brought in the State courts, and no such case may be removed from a State court of competent jurisdiction to a United States court." 77 Cong. Rec. 2948 (1933) (statement of Rep. Walter Lambeth). That result was in keeping with the tradition of state-law regulation to which securities offerings historically were subject.

Section 22(a) also reflected the 73d Congress's conclusion that, for the 1933 Act's civil-liability mechanism to work properly, investors needed the option of bringing lawsuits in state courts. In opposing attempts made the following year to strip state courts of jurisdiction over 1933 Act claims,[8]

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[8] *See*, *e.g.*, S. 3301, 73d Cong. § 9 (1934) (proposing to strike out "concurrent with State and Territorial courts" from section 22(a)); 78 Cong. Rec. 8703 (1934) (proposing to "insert[] before

James Landis – the 1933 Act's principal drafter and then-FTC Commissioner – told Congress that it was "undesirable" for Congress to "eliminate[] the concurrent jurisdiction of State and Territorial courts" over 1933 Act claims. 78 Cong. Rec. 8714, 8717 (1934). Congress thus rejected subsequent attempts to eliminate state-court concurrent jurisdiction over 1933 Act claims. *See*, *e.g.*, *supra* note 8. State-court jurisdiction over 1933 Act claims continued largely unquestioned for decades thereafter.

The 1934 Act. By contrast, Congress gave federal courts exclusive jurisdiction over claims arising under the Securities Exchange Act of 1934 ("1934 Act")[9] because Congress originally intended federal enforcement to be central to that statute. The 1934 Act established a far-reaching regulatory scheme and created the Securities and Exchange Commission ("SEC") to administer it. Unlike the 1933 Act, the 1934 Act was not geared toward public offerings for new securities – which States had an existing interest in regulating under their blue-sky laws – but instead focused on securities that were already trading on national exchanges. Given the 1934 Act's broad focus on national securities exchanges, Congress originally intended that the SEC be the statute's primary enforcer.

Consistent with its focus on federal regulatory enforcement, the 1934 Act conferred on federal courts "exclusive jurisdiction" over all claims brought thereunder. 1934 Act § 27, 48 Stat. 902 (codified as amended at 15 U.S.C. § 78aa(a)). That stood in stark

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the word 'jurisdiction' the word 'exclusive' and . . . strik[e] out 'concurrent with State and Territorial courts'").

[9] Act of June 6, 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a *et seq.*).

contrast to the 1933 Act, whose scheme of private civil enforcement distinguished it from the 1934 Act and led Congress to provide for state-court concurrent jurisdiction over private actions. *Compare* 78 Cong. Rec. 8099 (1934) (amending the securities exchange bill by "insert[ing] the word 'exclusive'" to make "entirely clear" that "the bill as drawn meant exclusive") (statement of Rep. Sam Rayburn) *with id.* at 8717 (statements by FTC Commissioner James Landis opposing proposal to make similar amendments to the 1933 Act).

In short, the 1933 Act (unlike the 1934 Act) has always given investors the option of a state forum for any and all private causes of action they choose to assert under that statute.

II. CONGRESS DID NOT INTEND SLUSA TO UPEND THE LONG TRADITION OF CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS

A. SLUSA Was Narrowly Targeted And Did Not Address State-Court Jurisdiction Over 1933 Act Claims

SLUSA was not intended to alter the well-settled, longstanding principle of concurrent state-court jurisdiction over 1933 Act claims. Congress enacted SLUSA to address a "very narrow" set of concerns it identified with the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA").[10] The PSLRA had sought to curb abusive

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[10] *See Implementation of the Private Securities Litigation Reform Act: Hearing Before the Subcomm. on Fin. & Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 39 (Oct. 21, 1997) ("*1997 House Hearing*") ("I don't think this hearing or the legislation that Mr. White and I have introduced is about recodifying securities laws. We're looking at some very, very

"federal securities fraud class actions" by "plac[ing] special burdens on plaintiffs" asserting such actions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006). To that end, the PSLRA's primary reforms were (1) to impose heightened pleading standards on 1934 Act claims, *see* 15 U.S.C. § 78u-4(b)(1), (2); (2) to create a safe harbor for forward-looking statements, *see id.* § 77z-2; and (3) to stay discovery in private securities actions pending resolution of any motion to dismiss, *see id.* §§ 77z-1(b), 78u-4(b)(3). The PSLRA also enacted other procedural reforms that Congress made applicable only to cases brought in federal court, such as a lead-plaintiff-appointment provision and a provision governing attorney's fees. *See* Resp. Br. 2-3.

Congress's concerns in the wake of the PSLRA did not extend to state-court class actions asserting exclusively 1933 Act claims.[11] Instead, SLUSA's primary stated purpose was to shore up the PSLRA by "limit[ing] the conduct of securities class actions under State law." SLUSA preamble, 112 Stat. 3227. As the Senate Committee Report explained, SLUSA reflected Congress's specific intention "to prevent *state laws* from being used to frustrate the operation and goals of the [PSLRA]." S. Rep. No. 105-182, at 2 (1998) (emphasis added). That focus on state-law

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narrow areas . . . .") (statement of co-sponsor Rep. Anna G. Eshoo).

[11] As respondents explain (at 11-17), SLUSA's text compels that same conclusion. While SLUSA's text divests state courts of jurisdiction over so-called "mixed" cases – covered class actions that assert both 1933 Act claims *and* precluded state-law claims – it does not divest state courts of concurrent jurisdiction over class actions that assert *exclusively* 1933 Act claims. *See* Resp. Br. 12-13. Respondents' interpretation of the text accords fully with SLUSA's legislative history, as explained below.

claims, and the particular risks to the PSLRA that those claims posed, *see infra* Part II.B, did not extend to 1933 Act claims.

In fact, during the legislative debates over SLUSA, Congress affirmatively declined to create exclusive federal jurisdiction over 1933 Act claims. In May 1997, when Congress was considering SLUSA, Rep. Tom Campbell introduced a bill entitled the Securities Litigation Improvement Act of 1997, H.R. 1653, 105th Cong. (1997). Like the failed attempts that had come before it in 1934, Rep. Campbell's proposal would have amended section 22(a) of the 1933 Act "by inserting 'exclusive' before 'jurisdiction'" and "by striking 'and, concurrent with State and Territorial courts.'" *Id.* § 2(a)(2)(A). But Congress declined to adopt that proposal and enacted SLUSA instead. Congress's failure to adopt a proposed bill that would have explicitly stripped state courts of jurisdiction over 1933 Act claims is strong evidence that it did not intend SLUSA to do so. *See Brown & Williamson*, 529 U.S. at 144 (rejecting proposed interpretation of statute where Congress had "considered and rejected bills" that would have explicitly adopted such an interpretation).

That is particularly true given the textual differences between Rep. Campbell's failed bill and the enacted SLUSA. The former, using clear and plain language, proposed that Congress make federal jurisdiction over 1933 Act claims "exclusive." The latter, by contrast, contained no such language. Petitioners are therefore left with a remarkably complex interpretation of an otherwise unremarkable set of statutory cross-references inserted by the "Conforming Amendments" section of SLUSA – from which they argue that Congress intended to reach

the same substantive result that Rep. Campbell had unsuccessfully proposed in straightforward terms. SLUSA § 101(a)(3), 112 Stat. 3230. But Congress, as this Court long has made clear, does not make such dramatic changes through linguistic subtleties. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Director of Revenue v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting argument that "Congress made a radical – but entirely implicit – change in the [law] . . . with [an amendment that] was merely one of numerous 'technical and conforming amendments'"). Had the 105th Congress intended to strip state courts of their concurrent jurisdiction over 1933 Act class actions – which at that point had existed for decades – it would have said so clearly.

B. SLUSA Was Aimed At Concerns About State-Law Securities Lawsuits

1. SLUSA's focus on state-law securities claims, rather than state-court actions asserting only 1933 Act claims, reflected the statute's core purpose. The 105th Congress's intent was to prevent plaintiffs from "circumventing [the PSLRA's] restrictions by bringing securities class actions *under state law* in state court." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (emphasis added). Four particular concerns – all of which Congress recognized and all of which animated SLUSA's reforms – illustrate that core purpose.

First, Congress found that plaintiffs were bringing state-law fraud claims to bypass the heightened pleading standards that the PSLRA imposed on claims brought under the 1934 Act. In amending the 1934 Act, the PSLRA required plaintiffs alleging fraud to state with particularity facts giving rise to a

strong inference of the defendant's fraudulent intent. PSLRA § 101(b), 109 Stat. 746-47 (codified as amended at 15 U.S.C. § 78u-4(b)(2)). Those heightened pleading standards were arguably the PSLRA's most significant reform: by curbing lawsuits (brought largely in the Ninth Circuit) based on conclusory scienter allegations,[12] Congress intended the PSLRA to curtail "[u]nwarranted fraud claims" under the 1934 Act. H.R. Conf. Rep. No. 104-369, at 41 (1995).

In the two years following the enactment of the PSLRA, however, plaintiffs began circumventing that key reform by asserting fraud claims under state statutory or common law, which were not subject to the PSLRA's heightened pleading standards for 1934 Act § 10(b) fraud claims. *See 1997 House Hearing* 23-24 (statement of SEC Chairman Arthur Levitt analyzing complaints filed in state court post-PSLRA). As the House Commerce Committee Report accompanying SLUSA explained, "the migration to State court was fueled by a desire to circumvent the more stringent requirements of the heightened pleading standard adopted under the [PSLRA]." H.R. Rep. No. 105-640, at 10-11 (1998); *see also* S. Rep. No. 105-182, at 3 (noting "'a "substitution effect" whereby plaintiff's counsel file state court complaints when the underlying facts appear not to satisfy new, more stringent federal pleading requirements'") (quoting SEC Commissioner Joseph Grundfest and Stanford Law School faculty member Michael A. Perino).

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[12] Before the PSLRA, the Ninth Circuit and a majority of other courts construed Federal Rule of Civil Procedure 9(b) literally to permit plaintiffs to "aver scienter generally . . . simply by saying that scienter existed." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545, 1547 (9th Cir. 1994) (en banc).

That problem was unique to 1934 Act claims. While the PSLRA amended the 1934 Act to heighten pleading standards with respect to both scienter and material falsity, *see* 15 U.S.C. § 78u-4(b)(1), (2), it imposed no heightened pleading standards on 1933 Act claims – even though material falsity *is* an element of 1933 Act claims.[13] Thus, to the extent certain securities class-action plaintiffs were looking to bypass the PSLRA's pleading reforms, there were no such reforms to "bypass" in the 1933 Act context. Instead, the pleading "problem" was that securities plaintiffs alleging fraud were repackaging what previously had been 1934 Act claims as state-law fraud claims. H.R. Rep. No. 105-640, at 10-11.[14]

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[13] 1933 Act claims have no scienter (intent to defraud) element. As certain of petitioners' *amici* have noted, some courts have held that 1933 Act claims that "sound in fraud" can be subject to the heightened pleading standard of Rule 9(b). *See Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004). But that point is essentially irrelevant to state-court actions asserting exclusively 1933 Act claims, which as a practical matter almost always disclaim any allegation of fraud or are otherwise limited to strict-liability allegations. *See*, *e.g.*, *Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 612 (S.D.N.Y. 2008) (disclaimer of any fraud allegations effectively removes 1933 Act complaints from any heightened pleading standards), *aff'd*, 347 F. App'x 665 (2d Cir. 2009).

[14] Some of petitioners' *amici* suggest that 1933 Act claims need to be litigated in federal court to afford issuers the benefit of the heightened federal pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See*, *e.g.*, Washington Legal Found. *Amicus* Br. 11-15, 32. Whatever the merits of that goal as a policy matter, it did not animate Congress when enacting the PSLRA or SLUSA. Both of those statutes predated *Twombly* and *Iqbal* by many years, and neither statute imposed any type of heightened pleading standard on 1933 Act claims.

Congress's solution to that problem in enacting SLUSA was simple: "to make Federal court the exclusive venue for securities *fraud* class action litigation." *Id.* at 10 (emphasis added). Indeed, SLUSA itself states that Congress intended "to prevent certain State private securities class action lawsuits *alleging fraud* from being used to frustrate the objectives of the [PSLRA]." SLUSA § 2(5), 112 Stat. 3227 (emphasis added). As respondents explain (at 27-28), divesting state courts of jurisdiction over class actions asserting only 1933 Act claims would have done nothing to advance that purpose.

Second, in enacting SLUSA, Congress found that investors were asserting state-law claims to prevent issuers from invoking the PSLRA's safe harbor for forward-looking statements. The PSLRA added safe-harbor provisions to both the 1933 Act and the 1934 Act to protect "forward-looking statements" that are accompanied by meaningful cautionary language or made without actual knowledge that they were false or misleading. *See* PSLRA §§ 102(a), (b), 109 Stat. 749, 753 (codified at 15 U.S.C. §§ 77z-2, 78u-5). Congress intended this safe harbor "to enhance market efficiency by encouraging companies to disclose forward-looking information." H.R. Conf. Rep. No. 104-369, at 43.

However, Congress found that the threat of state-law actions had a "chilling effect" on issuers' use of the safe harbor. S. Rep. No. 105-182, at 4. As Sen. Orrin Hatch explained, "actions [we]re often filed in state courts in order to circumvent [the safe harbor]. The resulting threat of frivolous lawsuits and liability under state law discourage[d] corporate disclosure of forward-looking information to investors, eroding investor protection and jeopardizing the capital

markets that are so important to the productivity of the fast-growing sectors of our economy." 144 Cong. Rec. S4802 (daily ed. May 13, 1998) (statement of Sen. Orrin Hatch).[15] That concern again demonstrates Congress's focus on actions asserting state-law securities claims, not those asserting only claims under the 1933 Act. Indeed, investors could not circumvent the PSLRA's safe-harbor provisions by filing 1933 Act claims in state court, because those provisions apply to all 1933 Act claims *regardless* of the forum in which they are brought. *See* 15 U.S.C. §§ 77z-2(a), 78u-5(a).

Third, Congress found that securities plaintiffs were bringing state-law securities actions to bypass the automatic discovery stay imposed by the PSLRA before a complaint has survived dismissal. *See* 144 Cong. Rec. S4789 (daily ed. May 13, 1998) (statement of co-sponsor Sen. Christopher J. Dodd). To prevent "fishing expedition" lawsuits, the PSLRA required courts to stay discovery pending a ruling on a motion to dismiss, absent exceptional circumstances. H.R. Conf. Rep. No. 104-369, at 37; *see* PSLRA §§ 101(a), (b), 109 Stat. 741, 747 (codified as amended at 15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)). Post-PSLRA, however, Congress found that some plaintiffs were filing in state court "'to avoid federal discovery stays.'" S. Rep. No. 105-182, at 3 (quoting SEC Commissioner Joseph

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[15] *See also* 144 Cong. Rec. S4790 (daily ed. May 13, 1998) ("'If one or more states do not have similar safe harbors, then issuers face potential state court lawsuits and liability for actions that do not violate federal standards . . . . [T]he state with the most plaintiff-favorable rules for forward looking disclosures, rather than the Federal Government, is likely to set the standard to which corporations will conform.'") (statement of co-sponsor Sen. Christopher J. Dodd) (quoting Stanford Law School faculty member Michael A. Perino).

Grundfest and Stanford Law School faculty member Michael A. Perino).

As with the other concerns identified above, the discovery stay illustrates that Congress was not focused on 1933 Act claims asserted in state court. Investors were attempting to circumvent the PSLRA's discovery stay primarily by asserting state-law securities-fraud claims in state court – as such claims are not subject to the PSLRA's stay provision. *See* 15 U.S.C. § 77z-1(b)(1) (applying discovery stay to "any private action arising under this subchapter"). That provides no justification for stripping state courts of jurisdiction over 1933 Act claims, as state courts often stay discovery over such claims regardless – either under their own local rules[16] or under the PSLRA.[17]

Fourth, in enacting SLUSA, Congress feared that state legislation expanding liability could reverse the PSLRA's protections State by State. The fear stemmed from Proposition 211, a California ballot initiative voted on in November 1996, which "would have created broad private rights of action based on claims of fraud, many in conflict with provisions of the [PSLRA]." *Securities Litigation Abuses: Hearing Before the Subcomm. on Sec. of the S. Comm. of*

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[16] *See*, *e.g.*, Order Deeming Case Complex and Staying Discovery, *Kerley v. MobileIron, Inc.*, No. 15-CV-284706 (Cal. Super. Ct., Santa Clara Cty., Sept. 1, 2015); Order Setting Case Management Conference ¶ 2, *In re Ooma, Inc. Shareholder Litig.*, No. CIV536959 (Cal. Super. Ct., San Mateo Cty., Mar. 23, 2016).

[17] *See*, *e.g.*, Notice of Ruling, *Shores v. Cinergi Pictures Entm't Inc.*, No. BC149861 (Cal. Super. Ct., Los Angeles Cty., Sept. 11, 1996); Ruling on Motion To Stay Discovery Pending Decision on Demurrers, *Milano v. Auhill*, No. SB213476, 1996 WL 33398997 (Cal. Super. Ct., Santa Barbara Cty., Oct. 2, 1996).

Banking, Hous. & Urban Affairs, 105th Cong. 44 (July 24, 1997) ("*1997 Senate Hearing*") (statement of SEC Chairman Arthur Levitt). Even though the initiative failed, there were concerns that similar measures would be introduced in other States. *See id.* President Clinton wrote: "[T]he possibility of changes in one or more states' securities laws similar to those proposed in California's Proposition 211 suggests that there may be a need to reconsider the appropriate balance of federal and state roles in securities law. . . . [T]he proliferation of multiple and inconsistent standards could undermine national law." Letter from President Bill Clinton to Sen. Christopher J. Dodd (July 23, 1997), *reprinted in 1997 Senate Hearing* 161. These concerns – again, unrelated to 1933 Act claims – provided important legislative momentum for SLUSA's provisions precluding state-law securities claims.[18]

2. True, petitioners note (at 26-27) some other PSLRA provisions that do apply to 1933 Act claims filed in federal court (but not to those filed in state court) – *e.g.*, rules governing class representatives, settlement, and Rule 11 sanctions, 15 U.S.C. § 77z-1(a)(2), (3), (c). But SLUSA's legislative history contains no indication that Congress intended SLUSA to address the operation of those provisions. None of the congressional reports on SLUSA focuses on those provisions, and the floor debates contain no evidence that the 105th Congress was especially

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[18] *See 1997 Senate Hearing* 44 ("Concerns have been raised that measures similar to Proposition 211 may be introduced in other States. In fact, the trend has been to enact reforms that limit, not expand, private rights of action.") (statement of SEC Chairman Arthur Levitt).

concerned with state-court actions circumventing those specific parts of the PSLRA.

In fact, in the two years after Congress enacted the PSLRA, "[n]o case ha[d] made its way to a jury, relatively few motions to dismiss ha[d] been decided, and there ha[d] been even fewer settlements" under the PSLRA. *1997 Senate Hearing* 10 (statement of SEC Chairman Arthur Levitt). Thus, the impact of the PSLRA provisions that petitioners cite was unknown when Congress enacted SLUSA. As "a narrowly constructed bill," *1997 House Hearing* 39 (statement of co-sponsor Rep. Anna G. Eshoo), SLUSA was not likely intended to address the theoretical concerns that petitioners identify.

III. PETITIONERS' READING OF SLUSA'S LEGISLATIVE HISTORY IS UNPERSUASIVE

Petitioners extract various snippets from SLUSA's legislative history that they claim evince Congress's intent to divest state courts of jurisdiction over class actions asserting exclusively 1933 Act claims. *See*, *e.g.*, Pet. Br. 25-28. Petitioners' arguments are unpersuasive and fail to show that Congress intended SLUSA to upend the long history of state-court concurrent jurisdiction over such claims.

To begin with, petitioners' arguments from the legislative history face a steep hurdle. The 1933 Act's concurrent-jurisdiction provision accords with this Court's longstanding assumption that state courts are "equally competent bod[ies]" to decide cases under federal law. *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 646 (2006). Given the deeply rooted presumption in favor of concurrent jurisdiction, "[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must . . .

affirmatively divest state courts of their presumptively concurrent jurisdiction." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). Implied divestment of state-court jurisdiction is strongly disfavored, and piecemeal statements in legislative history are inadequate "to overcome the presumption of concurrent jurisdiction." *Id.* at 824-25.

SLUSA's legislative history contains no evidence that Congress intended to trample on the long-held tradition of state-court concurrent jurisdiction over all actions asserting only 1933 Act claims. Indeed, in the debate over SLUSA, there was no clear discussion at all of whether Congress should divest state courts of jurisdiction to hear any 1933 Act claims. In its section-by-section analysis, neither the Senate report nor the House report even mentioned the conforming amendments on which petitioners rely. *See* S. Rep. No. 105-182, at 8-9; H.R. Rep. No. 105-640, at 16-18. That is because Congress devoted its attention instead to the federal preemption of state securities *laws*, not the elimination of state-court *actions*. *See*, *e.g.*, 144 Cong. Rec. H10,785 (daily ed. Oct. 13, 1998) (statement of Rep. Diana DeGette opposing preemption); *id.* at S4794 (daily ed. May 13, 1998) (statement of Sen. Richard Bryan opposing preemption); *see also* Resp. Br. 28-30 (further addressing SLUSA's legislative history).

Despite the general lack of attention given to 1933 Act claims in SLUSA's legislative history, petitioners point (at 22-24) to certain statements from the legislative history referring to federal courts as "the exclusive venue" for most securities class-action lawsuits. But the majority of such statements contained critical qualifiers: they evinced Congress's understanding that SLUSA would shift *most* – but not *all* –

securities class actions into federal court.[19] For example, in President Clinton's signing statement that petitioners cite (at 23), President Clinton stated that, "[s]ince the uniform standards provided by [SLUSA] state that class actions *generally* can be brought only in Federal court, where they will be governed by Federal law, clarity on the Federal law to be applied is particularly important." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) ("SLUSA Signing Statement") (emphasis added).

The legislative history of the PSLRA and SLUSA demonstrates that such statements were made in reference to securities-fraud claims (brought under either the 1934 Act or state law), which accounted for the vast majority (if not all) of the so-called "strike" suits with which Congress was concerned. SLUSA's central focus – and the goal that petitioners' legislative-history quotations reflect – was to prevent plaintiffs from using such securities actions to circumvent the PSLRA.[20]

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[19] *See*, *e.g.*, H.R. Conf. Rep. No. 105-803, at 13, 15 (1998); 144 Cong. Rec. E1424 (daily ed. July 24, 1998) ("The measure before us . . . would *generally* proscribe bringing a private class action suit involving 50 or more parties except in Federal court.") (statement of Rep. Jane Harman) (emphasis added); *id.* at H10,776 (daily ed. Oct. 13, 1998) ("By making Federal courts the exclusive venue for *most* of the securities class action lawsuits, [SLUSA] imposes the standards of the [PSLRA] on all securities class action lawsuits, except those narrow instances specifically excluded by [SLUSA].") (statement of Rep. John Dingell) (emphasis added).

[20] *See The Securities Litigation Uniform Standards Act of 1997 – S. 1260: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 35

Placed in that context, petitioners' interpretation of the legislative record falls apart. To be sure, the legislative history is replete with references to Congress's general intent to close the "loophole" in the PSLRA and to curb "abusive litigation" being brought in "State, rather than in Federal, court." Pet. Br. 21, 22. But it is conspicuously bare of congressional statements applying those general concerns to 1933 Act claims in particular. Most of the statements petitioners identify – such as Rep. Rick White's concern about suits "formerly brought in Federal court . . . now being brought in State court"[21] – are most naturally read to refer to state-law substitutes for 1934 Act claims (which traditionally were filed in federal court) rather than 1933 Act claims (over which state courts always have had concurrent jurisdiction). *Amici* are not aware of any such statement in SLUSA's legislative history advocating that *1933 Act litigation* specifically be moved to federal court.[22]

(Oct. 29, 1997) ("[W]hat we are talking about here is essentially 10(b)(5) litigation, and that is what Congress was focused on when it passed the [PSLRA].") (statement of Stanford Law School faculty member Michael A. Perino); *1997 Senate Hearing* 94 ("The most important step that Congress could take to fully implement its reforms would be to pass uniform standards legislation, ensuring that nationwide securities class actions replicating Federal 10b-5 lawsuits are brought and tried in Federal court.") (statement of Richard I. Miller).

[21] 144 Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. Rick White), *quoted in* Pet. Br. 21-22.

[22] Nor does the legislative history support petitioners' view (at 29) that SLUSA stripped state courts of jurisdiction over class actions asserting exclusively 1933 Act claims – even those that do not involve nationally traded securities. With the enactment of SLUSA, Congress was concerned only with nationally traded securities. *See* SLUSA § 2(5), 112 Stat. 3227

The full context of President Clinton's signing statement reinforces that conclusion. That signing statement reflects an understanding that SLUSA was focused on state-law claims brought in state courts, not 1933 Act claims: the signing statement focused on issuers "not using the Federal safe harbor for forward-looking statements" and state-court actions "being used to achieve an 'end run' around the [PSLRA]'s stay of discovery." SLUSA Signing Statement, 34 Weekly Comp. Pres. Doc. at 2248. As explained above (at 14-16), those concerns are inapplicable to state-court actions that assert only 1933 Act claims.

In short, with the enactment of SLUSA, Congress assumed that the 65-year tradition of state-court concurrent jurisdiction over 1933 Act claims would continue. *See*, *e.g.*, *1997 House Hearing* 10-11 ("[SLUSA] would ensure that the reforms included in the Federal law are adhered to by State courts.") (statement of Sen. Greg Ganske); 144 Cong. Rec. H6058 (daily ed. July 21, 1998) ("Lawsuits brought . . . in State and Federal courts can go forward. They simply go forward under the reforms we passed both on the Federal law and now conforming that Federal law to the 50 States.") (statement of Rep. Billy Tauzin). Generalized references in the legislative history to the dangers of abusive state-court lawsuits

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(finding it "appropriate to enact national standards for securities class action lawsuits *involving nationally traded securities*") (emphasis added); S. Rep. No. 105-182, at 23 ("[SLUSA] will . . . creat[e] a national standard for class action suits involving nationally traded securities.") (additional views of Sen. Jack Reed); 144 Cong. Rec. H6057 (daily ed. July 21, 1998) ("[This bill] only applies to securities that are traded on the three national exchanges in our country.") (statement of Rep. Rick White).

do not demonstrate an intent to overhaul that longstanding tradition with respect to 1933 Act claims. On the contrary: Congress understood in enacting SLUSA that investors would continue to have the freedom to choose a state-court forum in bringing actions that asserted only 1933 Act claims – as they always had.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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