No. 15-1439

In The Supreme Court of the United States

CYAN, INC., ET AL.,

Petitioners,

vs.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents.

On Writ Of Certiorari To The Court Of Appeal For The State Of California, First Appellate District

BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

JOE KENDALL
KENDALL LAW GROUP
3232 McKinney, Suite 700
Dallas, Texas 75204
Telephone: (214) 744-3000
Facsimile: (214) 744-3015
Email: jkendall@kendalllawgroup.com

TIMOTHY T. COATES
Counsel of Record
ALANA H. ROTTER
MARC J. POSTER
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
Email: tcoates@gmsr.com; arotter@gmsr.com; mposter@gmsr.com

Counsel for Amicus Curiae Los Angeles County Employees Retirement Association

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Los Angeles County Employees Retirement Association (LACERA) is a California public pension fund that provides retirement benefits to employees of Los Angeles County and participating agencies. It is the largest county retirement system in the United States, currently administering pensions for more than 168,000 members, and managing net assets of $52.7 billion.

LACERA relies in large part on investment income to fund the benefits promised to its public employee members. As of August 31, 2017, 24.3% of LACERA's assets were invested in U.S. equities, and another 22% in foreign equities.

Given LACERA's status as a large institutional investor and the importance of its mission of funding public employees' benefits, LACERA is frequently a class member in securities class actions that seek to recover damages resulting from alleged wrongful acts or omissions of others. Through those efforts, since 2001 LACERA has recovered $68.7 million for its pension members through securities class actions in both

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[1] Petitioners and respondents have filed blanket consents to amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, LACERA certifies that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than LACERA, its members, or its counsel have made such a monetary contribution.

state and federal courts. LACERA therefore is interested in how and where securities class action claims are litigated, and by supporting respondents as an amicus seeks to protect its ability to pursue such claims expeditiously and economically in an appropriate state court such as California.

SUMMARY OF ARGUMENT

Petitioners and their amici essentially argue that shareholders are flooding California's state courts with federal securities claims because state court procedures favor plaintiffs, and that the Securities Litigation Uniform Standards Act (SLUSA) therefore must be interpreted as stripping state courts of their longstanding concurrent jurisdiction over federal securities class action suits.

Petitioners' position rests on an incomplete picture of both SLUSA and the state courts. As explained in the Answering Brief, petitioners' position ignores SLUSA's actual language, which is not reasonably susceptible to petitioners' contention.[2] And as this amicus

[2] Congress knows how to limit state-court jurisdiction when that is what it intends. *See*, *e.g.*, the Securities Exchange Act of 1934, 15 U.S.C. § 78aa: "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

brief will demonstrate, state courts are not the plaintiff-friendly free-for-all that petitioners and their amici describe. Rather, they are an efficient forum for wronged shareholders to recover their losses, in front of judges with ample experience handling complex civil cases.

1. Plaintiffs bring federal securities actions in state courts for legitimate reasons. They are not simply gaming the system, as petitioners and their amici assert. State courts process federal securities cases expeditiously and efficiently, with judges who specialize in complex case management and understand the applicable laws and procedures. Just as in federal courts, state courts can and do stay discovery until the pleadings are set where appropriate; sustain demurrers where appropriate; stay cases on forum non-conveniens grounds where there is a concurrent federal suit that truly has parallel claims; and allow for interlocutory appellate review of certification decisions. California state courts are prime examples of these similarities.

2. Despite amici portrayals of federal class actions flooding into state court, there are actually very few such suits – and for the category of cases highlighted in the amicus briefs supporting petitioners (class actions alleging claims under Section 11 of the 1933 Securities Act), the numbers are decreasing: There were just *four* such suits filed in California state courts in the first half of 2017.

3. There are advantages to defendants as well as plaintiffs when appropriate cases are tried in state courts rather than federal courts. Not all cases involve hundreds of millions of dollars nor warrant the time and expense of an often drawn-out federal court proceeding. State court cases may be more expeditiously determined to be meritorious or not and resolved accordingly. Settlements do not vary significantly between state and federal courts. The net result is that, where appropriate, plaintiffs may obtain a greater net recovery at no greater net cost to the defendants.

ARGUMENT

I. Other Than The Fact That State Courts Resolve Securities Class Actions More Expeditiously Than Federal Courts, There Is Little Practical Difference Between State And Federal Court Procedures.

A. California State Courts Offer An Expeditious Forum For Institutional Shareholders To Litigate Securities Claims Before Judges Experienced In Handling Complex Litigation.

Section 11 of the 1933 Securities Act creates liability for defendants who make material misstatements or omissions in a registration statement in connection with a public offering of securities. *See* 15 U.S.C. § 77k. Stock purchasers, including institutional investors like amicus LACERA, may pursue such suits

when they purchase stock in an initial public offering (IPO), only to see the share price plummet in the ensuing months or years. The suits are a way to return some of the lost value to the purchasers, who paid a price that was artificially inflated by the company's misstatements or omissions.

Stock purchasers wronged by the issuing company's misstatements and omissions have legitimate reasons for filing certain federal securities cases in state courts rather than federal courts. In particular, class action cases often move more expeditiously in state courts than in federal courts. Class actions in state courts are typically assigned to "complex" litigation departments, where the judges can devote their full attention to class actions, know class action law and procedure, and are able to move cases along. State court actions may thus be resolved more promptly and economically than analogous suits in federal court. That means lower attorney costs on both sides and, for meritorious cases, a greater net recovery for the plaintiff class without greater cost to the defendants. Those considerations are particularly important where, although the plaintiffs unquestionably have been damaged by the defendants' misstatements and omissions, the aggregate damage amounts are relatively low.

B. Similar Pleading Standards.

Among the parade of horribles that petitioners' amici bemoan is that state court pleading standards are supposedly looser than federal pleading standards,

allowing more state court cases to proceed past the pleading stage. This claim fails at several levels.

First, Section 11 claims need not allege fraud, and *even in federal court*, Section 11 claims not alleging fraud are not subject to the heightened pleading standards imposed by the Private Securities Litigation Reform Act. *See Panther Partners, Inc. v. Ikanos Commc'n, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012). Rather, they are "'ordinary notice pleading case[s], subject only to the "short and plain statement" requirements of Federal Rule of Civil Procedure 8(a).'" *Id*. Moreover, as to Rule 8, the pleading standards imposed by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) cannot shed any light on what Congress intended when it enacted SLUSA, because *Twombly* and *Iqbal* were not decided until nearly a decade *after* SLUSA's 1998 enactment.

Second, California courts have applied federal pleading standards to Section 11 claims. *E.g.*, *Marcano v. Nye*, No. RG12 621290 at 5 (Cal. Super. Ct. Alameda Cnty. May 17, 2013) ("In the absence of published California decisions on the pleading standards for section 11 claims, the Court will rely on federal authorities"; sustaining demurrer without leave to amend).

Third, there is no reason to believe that California courts would permit sloppily-pleaded federal securities class actions to proceed past the pleading stage. Like federal courts, California courts are attuned to potential abuses of the class-action process. *E.g.*, *First Am. Title Ins. Co. v. Superior Court*, 146 Cal. App. 4th 1564,

1577 (2007) ("We cannot permit attorneys to make an 'end-run' around Proposition 64 [limiting certain class actions] by filing class actions in the name of private individuals who are not members of the classes they seek to represent and then using precertification discovery to obtain more appropriate plaintiffs"). Demurrers are sustained all the time.[3]

C. Similar Discovery Stays.

While the general rule in federal court securities class actions is to stay discovery once a motion to dismiss has been filed, the stay is not absolute. 15 U.S.C. § 78u-4(b)(3)(B). The statute explicitly permits discovery where particularized discovery is necessary to preserve evidence or to prevent undue prejudice. *Id.*; *see, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002) ("Where, as here, plaintiffs are not in any sense engaged in a fishing expedition or an

[3] *E.g.*, *O'Donnell v. Coupons.com Inc.*, No. 1-15-CV-278399 (Cal. Super. Ct. Santa Clara Cnty. May 24, 2016) (sustaining demurrer to Rule 11 claims without leave to amend); *In re GoPro, Inc. S'holder Litig.*, No. CIV 537077 (Cal. Super. Ct. San Mateo Cnty. Dec. 16, 2016) (sustaining demurrer to some plaintiffs' Section 12 claim without leave to amend for lack of standing); *In re Pure Storage S'holder Litig.*, No. 16CIV01183 (Cal. Super. Ct. San Mateo Cnty. Aug. 31, 2017) (demurrer as to Section 11 claim sustained with leave to amend); *In re Aerohive Networks, Inc. S'holder Litig.*, No. CIV 534070 (Cal. Super. Ct. San Mateo Cnty. Dec. 10, 2015) (demurrer sustained with leave to amend); *Marcano v. Nye*, No. RG12 621290 (Cal. Super. Ct. Alameda Cnty. Nov. 9, 2012) (sustaining demurrer to Section 11 claim with leave to amend).

abusive strike suit and do not thereby act in contravention of the fundamental rationales underlying the PSLRA discovery stay, and where plaintiffs would be substantially prejudiced by the maintenance of the stay, defendants cannot call upon the ambiguous notion of 'particularized' discovery to bend Section 78u-4(b)(3)(B) to a purpose for which it was not intended").

Conversely, although there is no statutory ban on precertification discovery in California state courts, as a practical matter discovery is often stayed at the outset of federal securities class actions in state courts. As one court explained in refusing to allow plaintiff to take discovery and then attempt to amend a deficient cause of action: "The usual rule is: state a good faith claim first; then take discovery." *In re King Digital Entm't PLC S'holder Litig.*, No. CGC-15-544770 at 12-13 (Cal. Super. Ct. San Francisco Cnty. Dec. 18, 2015). California courts also routinely stay discovery when a case is deemed complex, which securities class actions generally are.[4]

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[4] *E.g.*, *Kerley v. Mobileiron, Inc.*, No. 1-15-CV-284706 at 5 (Cal. Super. Ct. Santa Clara Cnty. Sept. 1, 2015) ("Pending further order of this Court, the service of discovery and the obligation to respond to any outstanding discovery is stayed"); *City of Warren Police and Fire Ret. Sys. v. Revance Therapeutics, Inc.*, No. 1-15-CV-287794 (Cal. Super. Ct. Santa Clara Cnty. Nov. 24, 2015) ("Order Deeming Case Complex and Staying Discovery"); *City of Warren Police and Fire Ret. Sys. v. A10 Networks*, No. 1-15-CV-276207 (Cal. Super. Ct. Santa Clara Cnty. Feb. 9, 2015) (same); *IBEW Local Union 363 – Money Purchase Pension Plan v. Fireeye, Inc.*, No. 1-14-CV-266866 (Cal. Super. Ct. Santa Clara Cnty. July 1, 2014) (same).

D. Similar Interlocutory Appellate Review.

Amici supporting petitioners assert that the federal rules allow for immediate petitions of interlocutory class certification rulings, while state courts do not. Actually, the California and federal procedures are analogous on this point.

Federal procedure. Federal Rule of Civil Procedure 23(f) provides limited potential for interlocutory appellate review. A court of appeals *may* permit an appeal from an order *granting or denying* class-action certification upon prompt petition for permission to appeal. *Id.* Even if permission is granted, however, the appeal does not automatically stay district court proceedings. *Id.* Petitions for Rule 23(f) review are granted "sparingly" and only in "rare cases." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Equivalent California procedure. The *granting* of class certification is subject to discretionary interlocutory appellate review, as in federal court. *Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 387 n.4, 556 P.2d 755, 759 n.4 (1976) (explaining that interlocutory review may be appropriate because "appeal from a final judgment is not a practical remedy"). Seeking such review does not require leave from the trial court. The *denial* of class certification is an appealable order under California law because the order is considered a "death knell" decision making it final for purposes of appeal. *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal. App. 4th 908, 925 (2001).

E. Minimal Risk Of Duplicative State And Federal Proceedings.

There is minimal risk of parallel state and federal class actions with duplicative costs and inconsistent rulings. Under California law, like the law in all states, when a court finds that in the interest of substantial justice an action should be heard in another forum, "the court shall stay or dismiss the action in whole or in part on any conditions that may be just." Cal. Civ. Proc. Code § 410.30(a). Courts routinely do so. *E.g.*, *Nat'l Football League v. Fireman's Fund Ins. Co.*, 216 Cal. App. 4th 902, 940 (2013) (affirming stay of proceedings pending the outcome of parallel New York actions).

Data in the amicus briefs supporting petitioners bears this out. Amici indicate that between 2011 and 2016, there were 25 parallel 1933 Securities Act cases in California and federal courts. Brief of Alibaba Group et al. in Support of Petitioners, Appendix A. In at least 5 of those cases, the state court stayed the action in favor of the federal case. Brief of Amici Curiae Law Professors in Support of Petitioners, Appendix B. Plaintiffs voluntarily dismissed 3 others in light of the federal suits. *Id*.

When federal and state class actions proceed concurrently against a defendant, it is often because the actions are not truly parallel. For example, the defendant company may have made multiple misrepresentations, resulting in different suits based on each one. *Compare, e.g.*, *Guo v. ZTO Express (Cayman) Inc.*, No.

17-CIV-03676 (Cal. Super. Ct. San Mateo Cnty.) (state action based on undisclosed subsidies to network partners) *with Nurlybayev v. ZTO Express (Cayman) Inc.*, No. 17-CV-06130 (S.D.N.Y.) (later-filed federal action based on inflated margins). Similarly, a company that made misrepresentations both in connection with its securities offering and in the open market may find itself sued by the purchasers it harmed by each category of misrepresentation. *Compare, e.g.*, *Oklahoma Police Pension & Ret. Sys. v. Sientra, Inc.*, No. CIV 536013 (Cal. Super. Ct. San Mateo Cnty.) (state action based on secondary offering registration statement) *with Flynn v. Sientra, Inc.*, No. 15-CV-07548-SJO (C.D. Cal.) (federal action based on open market statements, not secondary offering). In each of these cases, the two suits may be against the same defendant, but they are not identical – different relevant facts, and different legal standards.

II. The Facts Belie Petitioners' Amici's Depiction Of Securities Class Actions Flooding Into California State Courts; The Flood Is But A Trickle.

Petitioners and their amici portray the filing of 1933 Securities Act class action claims in California state courts as a widespread, growing threat. They describe such cases as a "flood" and bemoan the "dramatic increase" in state court filings. They argue that to prevent this impending flood, this Court must interpret a federal statute to bar Securities Act class actions from being filed in state court.

Besides the fact that the statute says nothing of the sort, there is a threshold problem with petitioners' and amici's argument: The facts do not support it.

Petitioners and their amici focus on Section 11 class actions. They emphasize that there were 16 Section 11 class actions filed in California state courts in 2015, and 17 in 2016. Those numbers hardly constitute a "flood."[5]

Moreover, the numbers do not indicate that plaintiffs are filing Section 11 claims in state court *instead of in*, or to avoid, federal court. Rather, the state trajectory tracks the federal trajectory. Section 11 filings in federal court more than doubled between 2013 and 2015, mirroring the spike in IPOs in the preceding three years. NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* at 8 (2017). IPO offerings slowed in 2015 and, in turn, so did Section 11 filings in federal court. *Id.* There was an even sharper decline in California courts in 2017: There were only *four* putative class actions alleging Section 11 claims filed in California state courts in the first half of 2017, on pace for a 56%

[5] In fiscal year 2014-2015, the last reporting period available, over 6.8 million cases were filed in California state courts. Of these, 192,761 were "unlimited" civil cases, i.e., those in which, like the typical class action, the claim exceeded $25,000. Judicial Council of California*, 2016 Court Statistics Report, Statewide Caseload Trends, 2005-2006 Through 2014-2015* at 69-70 (http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf). Sixteen out of 192,761 equals a mere .0083% of comparable California civil cases.

decrease from 2016. *See* Cornerstone Research, *Securities Class Action Filings – 2017 Midyear Assessment* at 4, 12, 14 (2017). Meanwhile, Section 11 putative class actions in *federal* court continued at their 2016 pace during the first half of 2017. *Id.* at 14.

The bottom line is that, contrary to petitioners' and amici's portrayal, Section 11 plaintiffs are not flocking to state courts, especially California state courts, at increasing rates. Section 11 filings mirror IPO offerings; as the number of IPOs has dropped, so has the number of Section 11 suits – and the drop has been sharper in state court than in federal court.

III. There Is No Evidence That Any Differences Between Federal And State Forums Impact The Amount For Which Cases Settle.

An amicus brief supporting petitioners asserts that the median settlement amount for Securities Act cases is lower in federal court than in California state courts, and that this demonstrates that plaintiffs are "taking advantage of the differences between state and federal court. . . ." Brief of Amici Curiae Law Professors in Support of Petitioners 24-25. But correlation is not the same as causation, and the brief does not identify any evidence that the differing midpoints are *caused* by any differences between the two forums.

Nor does the brief explain why the median settlement amount is a relevant metric. Focusing on the arithmetic *mean* – the average settlement amount – instead of the *median* – the settlement at the midpoint

of the total number of settlements – produces exactly the opposite result: The mean state court settlement was *lower* than the mean federal court settlement, by more than $6 million. Does that mean that the state courts are a more favorable forum for defendants than federal courts?

Furthermore, even if settlements in state court cases are, on average, greater than settlements in federal court cases, that does not prove that similar cases are treated dissimilarly in state and federal courts. The raw numbers say nothing about the relative merits of the cases that settled.

Finally, petitioners and their amici erroneously assume that Congress intended to deprive state courts of jurisdiction to hear federal securities class actions in order to limit the settlement value of those cases. There is no evidence of that, either. The only intent actually expressed by Congress was to allow for just compensation to individual investors when corporations mislead them about IPO's and mergers and acquisitions; to provide an effective means by which numerous individual investors can band together to obtain that compensation; and to promote the fundamental integrity and stability of our corporate economy.

CONCLUSION

In short, there are no significant differences between state and federal class action procedures that would compel the conclusion that, without expressly

saying so, Congress intended to strip state courts of all jurisdiction to hear federal securities class actions. LACERA urges the Court to so hold.

Respectfully submitted,

JOE KENDALL
KENDALL LAW GROUP

TIMOTHY T. COATES
Counsel of Record
ALANA H. ROTTER
MARC J. POSTER
GREINES, MARTIN, STEIN &
RICHLAND LLP

Counsel for Amicus Curiae
Los Angeles County Employees
Retirement Association

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