No. 20A-_____

In The
Supreme Court of the United States

PIVOTAL SOFTWARE, INC., ET AL.,

Applicants,

v.

ZHUNG TRAN, ET AL.,

Respondents.

APPLICATION FOR A STAY PENDING THE DISPOSITION OF APPLICANTS' PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

ROMAN MARTINEZ
MELISSA ARBUS SHERRY
ANDREW B. CLUBOK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Washington, DC 20004

Counsel for Applicants Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Barclays Capital Inc., Credit Suisse Securities (USA) LLC, RBC Capital Markets, LLC, UBS Securities LLC, Wells Fargo Securities LLC, KeyBanc Capital Markets Inc., William Blair & Company, L.L.C., Mischler Financial Group, Inc., Samuel A. Ramirez & Co., Inc., Siebert Cisneros Shank & Co., LLC, and Williams Capital Group, L.P. (the latter two, Siebert Williams Shank & Co., LLC)

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
LENA H. HUGHES
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2100 L Street, NW
Washington, DC 20037
(202) 887-8740
dmaynard@mofo.com

JORDAN ETH
MARK R.S. FOSTER
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Applicants Pivotal Software, Inc., Robert Mee, Cynthia Gaylor, Paul Maritz, Michael Dell, Zane Rowe, Egon Durban, William D. Green, Marcy S. Klevorn, and Khozema Z. Shipchandler

Additional Counsel Listed on Inside Cover

MAY 3, 2021

ELIZABETH L. DEELEY
GAVIN M. MASUDA
JOSEPH C. HANSEN
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

Counsel for Applicants Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Barclays Capital Inc., Credit Suisse Securities (USA) LLC, RBC Capital Markets, LLC, UBS Securities LLC, Wells Fargo Securities LLC, KeyBanc Capital Markets Inc., William Blair & Company, L.L.C., Mischler Financial Group, Inc., Samuel A. Ramirez & Co., Inc., Siebert Cisneros Shank & Co., LLC, and Williams Capital Group, L.P. (the latter two, Siebert Williams Shank & Co., LLC)

JOHN L. LATHAM
ANDREW T. SUMNER
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309

GIDON M. CAINE
ALSTON & BIRD LLP
1950 University Avenue
Suite 430
East Palo Alto, CA 94303

Counsel for Applicant Dell Technologies Inc.

PARTIES TO THE PROCEEDING

Applicants (defendants-petitioners below) are Pivotal Software, Inc.; Robert Mee; Cynthia Gaylor; Paul Maritz; Michael Dell; Zane Rowe; Egon Durban; William D. Green; Marcy S. Klevorn; Khozema Z. Shipchandler; Morgan Stanley & Co. LLC; Goldman Sachs & Co. LLC; Citigroup Global Markets Inc.; Merrill Lynch, Pierce, Fenner & Smith Inc.; Barclays Capital Inc.; Credit Suisse Securities (USA) LLC; RBC Capital Markets, LLC; UBS Securities LLC; Wells Fargo Securities LLC; KeyBanc Capital Markets Inc.; William Blair & Company, L.L.C; Mischler Financial Group, Inc.; Samuel A. Ramirez & Co., Inc.; Siebert Cisneros Shank & Co., LLC; Williams Capital Group, L.P. (the latter two, Siebert Williams Shank & Co., LLC); and Dell Technologies Inc.

Respondents are Zhung Tran, Alandra Mothorpe, and Jason Hill (plaintiffs-real parties in interest below) ("Plaintiffs") and the Superior Court for the City and County of San Francisco (respondent in the Court of Appeal).

CORPORATE DISCLOSURE STATEMENT

Applicant Pivotal Software, Inc. ("Pivotal") states that VMware, Inc. and Dell Technologies Inc. directly or indirectly own 10% or more of Pivotal's stock, and that no other publicly held company owns 10% or more of Pivotal's stock.

Applicant Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc. 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

Applicant Goldman Sachs & Co. LLC is a wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("Group Inc."), except for de minimis nonvoting, non-participating interests held by unaffiliated broker-dealers. Group Inc. is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. No other publicly held company owns a 10% or more interest in Goldman Sachs & Co. LLC.

Applicant Citigroup Global Markets Inc. is a wholly-owned subsidiary of Citigroup Financial Products Inc., which in turn, is a wholly-owned subsidiary of Citigroup Global Markets Holdings Inc., which in turn, is a wholly-owned subsidiary of Citigroup Inc., a publicly traded company. Citigroup Inc. has no parent

corporation, and no publicly traded corporation owns 10% or more of its stock to the best of Citigroup Global Markets Inc.'s knowledge.

Applicant Merrill Lynch, Pierce, Fenner & Smith Inc. (n/k/a BofA Securities, Inc.) is a direct, wholly-owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct, wholly-owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange and has no parent corporation. Based on the U.S. Securities and Exchange Commission Rules regarding beneficial ownership, Berkshire Hathaway Inc., 3555 Farnam Street, Omaha, Nebraska 68131, beneficially owns greater than 10% of Bank of America Corporation's outstanding common stock.

Applicant Barclays Capital Inc. is an indirect wholly-owned subsidiary of Barclays PLC, a publicly traded corporation, and no other publicly traded entity owns 10% or more of Barclays Capital Inc.'s stock.

Applicant Credit Suisse Securities (USA) LLC is a wholly-owned subsidiary of Credit Suisse (USA), Inc., a private company, which is a wholly-owned subsidiary of Credit Suisse Holdings (USA), Inc., a private company, which is a jointly-owned subsidiary of (1) Credit Suisse AG, Cayman Islands Branch, which is a branch of Credit Suisse AG, and (2) Credit Suisse AG, a private company, which in turn is a wholly-owned subsidiary of Credit Suisse Group AG, a publicly held company. Credit Suisse Group AG has no parent company and no publicly held corporation owns 10% or more of its stock.

Applicant RBC Capital Markets, LLC is an indirect wholly-owned subsidiary of Royal Bank of Canada, which is a publicly traded company. Royal Bank of Canada has no parent company, and there are no publicly held companies that own 10% or more of Royal Bank of Canada's common stock.

Applicant UBS Securities LLC's corporate parents are UBS Americas Holding LLC and UBS Americas Inc., the latter of which is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is wholly owned by UBS AG, which is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG stock.

Applicant Wells Fargo Securities, LLC is a wholly-owned subsidiary of EVEREN Capital Corporation. EVEREN Capital Corporation is a wholly-owned subsidiary of WFC Holdings, LLC, which, in turn, is a wholly-owned subsidiary of Wells Fargo & Company, a publicly traded corporation. Wells Fargo & Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Applicant KeyBanc Capital Markets Inc. is a wholly-owned subsidiary of KeyCorp. KeyCorp is a publicly held company whose shares are traded on the New York Stock Exchange. The Vanguard Group, Inc., a publicly held company, owns 10% or more of KeyCorp's shares. No other publicly held company owns 10% or more of KeyCorp's shares.

Applicant Mischler Financial Group, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Applicant Samuel A. Ramirez & Co., Inc. is wholly owned by SAR Holdings, Inc., which is owned by its employees, and no publicly held corporation owns 10% or more of its stock.

Applicant William Blair & Company, L.L.C. is a wholly-owned subsidiary of WBC Holdings, L.P. WBC Holdings, L.P. is privately owned by approximately 180 limited partners who are active in the firm's businesses. To the best of its knowledge, no publicly held corporation owns 10% or more of the stock of WBC Holdings, L.P.

Applicant Siebert Williams Shank & Co., LLC ("SWS") hereby discloses that Shank Williams Cisneros, LLC is the non-publicly traded parent company of SWS.

Applicant Dell Technologies Inc. is a corporation whose Class C shares are traded on the New York Stock Exchange. There are no interested entities or persons other than Michael S. Dell, Silver Lake Partners, a private equity firm, and Dodge & Cox, a privately held complex of mutual funds, with an ownership interest of 10% or more in any class of the equity securities of Dell Technologies Inc.

TABLE OF CONTENTS

LIST OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

To the HONORABLE ELENA KAGAN, Associate Justice of the Supreme Court of the United States:

Applicants seek an immediate stay from this Court to ensure they do not suffer the very harm Congress sought to prevent. *See* 28 U.S.C. § 1651; Sup. Ct. R. 23. In the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (the "Reform Act"), Congress sought to curb various abuses of the federal securities laws, including the Securities Act of 1933, 15 U.S.C. § 77a, et seq. (the "Securities Act"). Among other things, Congress was concerned that securities plaintiffs' burdensome discovery requests would force early settlements of meritless claims, thus incentivizing plaintiffs to bring meritless claims. Congress thus crafted a provision that automatically stays all discovery until the presiding court has sustained the legal sufficiency of the complaint. *See* 15 U.S.C. § 77z-1(b)(1). The Reform Act's discovery-stay provision applies "[i]n *any* private action arising under" the Securities Act. *Ibid.* (emphasis added).

Despite that plain language, state courts across the country are sharply divided over whether this discovery-stay provision applies to Securities Act suits brought in state court, rather than just to ones brought in federal court. Some state courts (like the one here) permit discovery to proceed before determining whether plaintiffs have stated a claim. Others—recognizing that "any" private Securities Act action means "any" private Securities Act action—do not. The divide has only deepened since this Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), which confirmed that state courts retain

concurrent jurisdiction over Securities Act claims. Since *Cyan*, plaintiffs have increasingly filed Securities Act claims in state courts, where the potential for obtaining discovery on even meritless claims creates the opportunity to coerce a settlement.

This case is a prime example of the problems that arise when state trial courts disregard an express congressional mandate. Plaintiffs invoked the Securities Act to sue Applicants in California state court. They challenge allegedly false statements contained in a registration statement that Applicant Pivotal Software, Inc. ("Pivotal") issued in connection with its April 2018 initial public offering ("IPO"). Those claims are meritless—a federal district court has already dismissed a parallel lawsuit advancing similar claims. *In re Pivotal Sec. Litig.*, No. 19-CV-03589-CRB, 2020 WL 4193384 (N.D. Cal. July 21, 2020). And the California trial court has not overruled Applicants' demurrer or otherwise suggested that Plaintiffs have stated a viable claim. But the trial court still allowed Plaintiffs to seek discovery, concluding that the Reform Act's automatic discovery-stay provision applies only in federal court. As a result, Plaintiffs have proceeded with expansive requests for costly production of documents and written interrogatories targeting the twenty-six Applicants.

The Court should act now to stay the trial court's order subjecting Applicants to such Reform-Act-barred discovery pending disposition of Applicants' petition for a writ of certiorari, which they are filing today. All of the requirements for a stay are satisfied here.

First, there is a reasonable probability that this Court will grant review. The division among the state trial courts shows no hint of resolving itself, and they are the only courts likely ever to decide this federal question, which evades appellate review. Clarification of this issue is of critical importance, particularly because the number of federal securities actions filed in state courts has increased in the wake of *Cyan*.

Second, this Court is likely to reverse if it grants review. The trial court's decision contradicts the plain text of the Reform Act's discovery stay—which, again, applies "[i]n *any* private action arising under" the Securities Act, 15 U.S.C. § 77z-1(b)(1) (emphasis added)—and misreads *Cyan*. Plaintiffs should not be permitted to invoke the Securities Act to get into court, then ignore the textual limitations Congress imposed on such suits.

Third, absent this Court's intervention, Applicants will suffer irreparable harm. The decision below deprives Applicants—Pivotal, its Directors, its majority stockholder, and fifteen financial institutions that underwrote Pivotal's IPO (the "Underwriter Applicants")—of the statutory right Congress guaranteed them in the Reform Act, exposing them to months of costly discovery before Plaintiffs establish they have pleaded a viable claim. With document discovery now getting underway and responses to expansive interrogatories due in early June, these escalating costs threaten to compel Applicants to succumb to the ultimate harm Congress intended the Reform Act's discovery stay to prevent: pressure to settle baseless claims.

Finally, the balance of the equities weighs heavily in Applicants' favor. Applicants will endure the costs of responding to Plaintiffs' production demands, and the coercive settlement pressure that ensues, if this Court does not act to ensure that the Reform Act's discovery stay is applied according to its terms. Plaintiffs, by contrast, will experience no meaningful prejudice whatsoever if they must do nothing more than plead a viable Securities Act claim before proceeding with discovery.

A stay is warranted while this Court resolves Applicant's certiorari petition, to which Plaintiffs should be ordered to respond in time for this Court to consider it at the June 24, 2021 conference. And because Applicants' Reform Act rights are being irreparably lost each day, an immediate administrative stay while this Court considers this application is warranted as well.

ORDERS BELOW

The California Superior Court's order allowing Plaintiffs to take discovery is unreported, but reproduced at Stay App. 1a-7a. The order of the California Court of Appeal, First Appellate District, denying Applicants' petition for writ of mandate and accompanying stay request is unreported, but reproduced at Stay App. 8a. The California Supreme Court's order denying Applicants' petition for review and stay application is unreported, but reproduced at Stay App. 9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the Court of Appeal's denial of Applicants' writ petition (Stay App. 8a) finally terminated a "self-contained case." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349 (2020); *see*

Bandini Petrol. Co. v. Super. Ct., 284 U.S. 8, 14 (1931); CAL. CONST. art. 6, § 10. Given that the denial was summary, the Court "looks through" to "the last reasoned decision," which here is that of the Superior Court. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (internal quotation marks omitted); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 3.12 (11th ed. 2019). The Court also has jurisdiction to review the Superior Court's order (Stay App. 1a-7a) because the order definitively resolved this federal issue, which is independent of any other matters remaining to be litigated, and which Applicants cannot raise again in state court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-81 (1975). The Court exercised jurisdiction under these circumstances in *Cyan*, 138 S. Ct. at 1068-69. And the Court has jurisdiction over this stay application under 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

A. Statutory Framework

Congress enacted the Reform Act to combat "perceived abuses" of the federal securities laws—both the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (the "Exchange Act"). *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Among other things, Congress mandated sanctions for frivolous litigation, imposed a heightened pleading standard for certain claims, created a "safe harbor" for forward-looking statements, and (as directly relevant here) prohibited discovery until after the complaint had survived a motion to dismiss. *Ibid.* (internal quotation marks omitted); *see* 15 U.S.C. § 77z-1.

Some federal securities claims—such as those under Sections 77k, 77*l*, and 77*o* of the Securities Act—may be brought in either federal or state court. *See Cyan*, 138 S. Ct. at 1066 (rejecting argument that statute subsequent to Reform Act stripped state courts of jurisdiction they previously exercised). As a result, many Reform Act provisions apply to Securities Act claims regardless of whether they are filed in federal or state court. *Ibid*.

The question here is whether the Reform Act's discovery-stay requirement is one such generally applicable provision. It provides, in relevant part:

> In *any private action arising under this subchapter*, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 77z-1(b)(1) (emphasis added). "[T]his subchapter," in turn, refers to subchapter 2A of Title 15 of the U.S. Code—that is, the Securities Act. *See* 15 U.S.C. § 77a.[1] Thus, the plain terms of the Reform Act stay discovery in "any" private Securities Act action.

B. Factual And Procedural Background

1. Pivotal goes public and Plaintiffs sue

Pivotal provides a "cloud-native" software platform called Pivotal Cloud Foundry that allows customers to build, deploy, and operate cloud-based software

[1] In the statute enacted by Congress (which was subsequently codified), the provision read "any private action arising under this *title*," which likewise referred to "the Securities Act of 1933." Private Securities Litigation Reform Act of 1995, Pub. L. No. 104 67, §§ 101-02, 109 Stat. 737 (emphasis added).

and applications. First Am. Consolidated Compl. at ¶¶ 2, 16, *In re Pivotal Software, Inc. Sec. Litig.*, No. CGC19576750 (Cal. Super. Ct. Jan. 15, 2021).[2] Pivotal launched its IPO in April 2018 at a price of $15 per share. *Id.* at ¶¶ 77-79. Pivotal's registration statement included a detailed overview of Pivotal's products, business operations, and financial results, along with almost forty pages of risk disclosures. *In re Pivotal Sec. Litig*., 2020 WL 4193384 at *2.

In August 2019, Pivotal announced a proposed merger with VMware, Inc. at $15 per share, the same price as the IPO. Stipulation and Order to Stay at 1 (Oct. 1, 2019). The merger closed at the end of 2019. *Ibid*. Stockholders who purchased stock in the IPO and held their shares through the merger thus broke even.

After Pivotal lowered its going-forward guidance in June 2019, its stock price fell, and Plaintiffs filed substantially identical class actions in California Superior Court, purportedly on behalf of all those who purchased Pivotal stock in its IPO. The complaints all asserted claims under the Securities Act, alleging that Pivotal's registration statement, which described "cutting-edge" products in a "rapidly growing market," was false and misleading, and that it made inadequate disclosures. *See, e.g.*, First Am. Consolidated Compl. at ¶¶ 64, 88-109 (Jan. 15, 2021) (internal quotation marks omitted); Am. Compl. at ¶¶ 54, 56 (Sept. 24, 2021). The cases were consolidated. Stipulation and Order Consolidating Cases at 1 (Jan. 6, 2020).

[2] Subsequent citations to documents entered on the California Superior Court's docket are cited by title and date.

2. The federal court dismisses parallel federal suits

At the same time, federal plaintiffs commenced three parallel lawsuits on behalf of a similar group of Pivotal stock purchasers. The federal court cases, consolidated before Judge Charles R. Breyer in the Northern District of California, proceeded first. The federal plaintiffs asserted Securities Act claims similar to those in the state court actions. *In re Pivotal Sec. Litig.*, 2020 WL 4193384, at *2.

The federal district court dismissed the consolidated federal complaint for failure to state a claim. As the court explained, the federal plaintiffs had not plausibly alleged that any of the challenged statements about Pivotal's product offerings, Pivotal's competition, or risks to Pivotal's business were actually false. *In re Pivotal Sec. Litig.*, 2020 WL 4193384 at *6-*7. It further concluded that all claims based on statements of corporate optimism or that were forward-looking in nature were inactionable as a matter of law, and that Pivotal had violated no applicable duty to disclose. *Id.* at *6-*8; *18-*19. And although the district court permitted amendment, the federal plaintiffs voluntarily dismissed with prejudice. Stipulation and Order to Dismiss at 2-3, *In re Pivotal Sec. Litig.*, No. 19-cv-03589-CRB (N.D. Cal. Sept. 15, 2020), ECF 104.

3. Plaintiffs seek discovery in state court

During the pendency of the federal action, Plaintiffs voluntarily stayed the state court action. Stipulation and Order to Stay at 1-4 (Oct. 1, 2019); Stipulation and Order to Stay Case Management Conference at 1-5 (Feb. 10, 2020); Joint Case Management Conference Statement at 1-10 (Oct. 20, 2020). But once the federal

district court dismissed that parallel action, Plaintiffs immediately sought discovery in the state court action even though their complaint had not yet survived a pleading challenge. Joint Case Management Conference Statement at 7-8 (Oct. 20, 2020). Plaintiffs insisted that the Reform Act's discovery-stay provision, Section 77z-1(b)(1), did not apply in state court. *Ibid*. Applicants responded that, by its plain terms, the Reform Act's discovery stay applies in both state and federal court, and offered to brief the issue. *Id.* at 8-9. But on October 27, 2020, the trial court summarily denied Applicants' request for a discovery stay, as well as its offer of briefing. Stay App. 10a-11a. It also granted Plaintiffs' request for an elongated schedule on Applicants' demurrer, setting a hearing on it for June 16, 2021. Stay App. 10a-11a.

Plaintiffs served their first discovery requests a few weeks later. Those requests were as broad and burdensome as they come. Plaintiffs demanded of Pivotal, among other things, "[a]ll documents and communications related to Pivotal's product offerings," "[a]ll documents and communications distributed at, used during, created in connection with, or concerning any meeting involving any Pivotal management or executives," and "[a]ll documents and communications related to Pivotal's quarterly and annual financial and operational results and forecasts for fiscal years 2018, 2019, and 2020." Stay App. 41a-43a. Plaintiffs served equally broad discovery requests on each of the other 25 Applicants. Stay App. 48a-61a, 64a-78a.

In the meantime, Applicants filed a petition for writ of mandate and request for an immediate stay with the California Court of Appeal. Although the trial court

had rejected Applicants' request to provide full briefing, the Court of Appeal denied relief because the challenged ruling was based on "the parties' summary arguments in a case management conference statement" and Applicants "did not thoroughly present the positions urged in the present petition by way of a stay motion filed in the superior court." Stay App. 12a. The court also reasoned that "the petition does not persuasively demonstrate" that Applicants "will suffer cognizable irreparable harm absent writ review." Stay App. 12a.

4. The state court denies Applicants' stay motion

In accordance with the Court of Appeal's order, Applicants then filed a formal motion to stay discovery in the trial court. After the parties thoroughly briefed whether the Reform Act's discovery stay applies in state court, the trial court denied the motion and allowed discovery to go forward on March 4, 2021. Stay App. 1a-7a.

While acknowledging that Section 77z-1(b)(1) expressly states it applies to "any private action arising under" the Securities Act, the trial court believed the provision's lack of an express reference to state courts precluded its application in those courts. Stay App. 3a-4a. The court also relied on distinct subsections of the Reform Act to conclude that the statute "is replete with procedural devices and associated federal nomenclature." Stay App. 4a. And the court believed (Stay App. 5a) that reading the Reform Act's discovery-stay provision to apply in state court would render redundant a separate provision of the subsequently enacted Securities Litigation Uniform Standards Act of 1998 ("SLUSA") that allows a court in certain actions to stay discovery "in any private action in a State court." 15 U.S.C. § 77z-1(b)(4).

The court thus rejected (Stay App. 5a) Applicants' contention that, because the SLUSA provision has broader applicability than Section 77z-1(b)(1), it would not be rendered superfluous.

In addition, the trial court concluded that limiting Section 77z-1(b)(1)'s discovery stay to federal court was consistent with the provision's "procedural nature." Stay App. 5a-6a. The court appeared to read this Court's decision in *Cyan* to require an assessment of whether a given Reform Act provision is "procedural" or "substantive" when determining if the provision applies in state court. Stay App. 5a-6a (internal quotation marks omitted). Pointing to the minutes of the Civil Rules Advisory Committee (and not any congressional materials), the trial court declared that the Reform Act's legislative history supported the conclusion that Section 77z-1(b)(1) is "procedural" and therefore inapplicable in state court. Stay App. 6a-7a.

5. The California Court of Appeal and Supreme Court deny Applicants' petitions and stay requests

Applicants sought a writ of mandate and accompanying stay from the California Court of Appeal. Stay App. 111a-168a. The Court of Appeal summarily denied relief without a written opinion on March 22, 2021. Stay App. 8a. Applicants then petitioned the California Supreme Court for review, and asked for an immediate stay of the trial court's order permitting discovery. On April 14, 2021, the California Supreme Court also summarily denied relief without written opinion. Stay App. 9a.

Plaintiffs are now pressing forward with their expansive and burdensome discovery requests before the trial court has determined that their complaint even states a claim. They seek to require Applicants to implement costly forensic

collection, processing, and hosting of electronically stored information, as well as manual review of potentially hundreds of thousands of documents for responsiveness and privilege. They have also served special written interrogatories that cast an equally wide net. Document discovery is now getting underway and Applicants' responses to expansive interrogatories are due in early June 2021.

REASONS FOR GRANTING A STAY

This Court should stay the state court's order allowing discovery in violation of the Reform Act pending disposition of Applicants' petition for a writ of certiorari. Such a stay is warranted if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those requirements are readily met here. And on top of that, the "balance of equities" weighs strongly in Applicants' favor. *Id.* at 196.

I. A REASONABLE PROBABILITY EXISTS THAT THIS COURT WILL GRANT CERTIORARI

There is a "reasonable probability" this Court will grant certiorari to address the critical question of federal law presented here: whether the Reform Act's discovery stay applies in state court. *Id.* at 190. State trial courts throughout the country are divided on this issue, which is of increasing significance as state court Securities Act filings have increased in the wake of *Cyan*. And those trial courts that have refused to apply the Reform Act's discovery stay have done so in defiance of Congress's clear mandate, subverting Congress's effort to prevent unnecessary

discovery that creates coercive pressure to settle meritless claims. This Court's intervention is needed.

State trial courts nationwide have sharply divided on whether the Reform Act's discovery stay applies to them. These courts are the only courts likely ever to address the issue, which arises during a limited portion of any case and is not reviewable after final judgment. It thus consistently evades appellate review. And litigants continue to confront trial courts with the entrenched split of authority, which they are left to navigate without appellate guidance. *See, e.g., In re Greensky, Inc. Sec. Litig.*, No. 655626/2018, 2019 WL 6310525, at *1 (N.Y. Sup. Ct. Nov. 25, 2019) ("Courts, even in this County, are split on whether the stay set forth in the Private Securities Litigation Reform Act of 1995 (the PSLRA) necessarily applies to state proceedings.").

Left on their own, many state trial courts—adhering to the plain language of Section 77z-1(b)(1)—have concluded that it applies in both state and federal court. *See City of Livonia Retiree Health and Disability Benefits Plan v. Pitney Bowes Inc.*, No. X08 FST CV 18 6038160 S, 2019 WL 2293924, *4 (Conn. Super. Ct. May 15, 2019); *In re Greensky, Inc. Sec. Litig.*, 2019 WL 6310525, at *2; *In re Everquote, Inc. Sec. Litig.*, 106 N.Y.S.3d 828, 828 (N.Y. Sup. Ct. 2019); Order Re Motion To Dismiss Or Stay at 2, *In re Pronai Therapeutics, Inc. Shareholder Litig.*, No. 16CIV02473, (Cal. Super. Ct. Mar. 14, 2018) (attached at Stay App. 169a-171a); Notice of Ruling at 2, *Shores v. Cinergi Pictures Ent., Inc.*, No. BC149861 (Cal. Super. Ct. Sept. 11, 1996) (attached at Stay App. 172a-174a); *Milano v. Auhll*, No. SB 213 476, 1996 WL 33398997, at *2 (Cal. Super. Ct. Oct. 2, 1996); *see also* Michael Klausner et al., *State*

Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi), 75 The Business Lawyer 1769, 1773 n.16 (2020) (citing an additional unreported decision, Endorsement on Motion to Stay Discovery, *Carlson v. Ovascience Inc.*, No. 1584CV03087 (Mass. Super. Ct. June 2, 2016), as enforcing the stay provision). These courts have correctly recognized that Section 77z-1(b)(1) "is not ambiguous and that its plain meaning compels the conclusion that the statute, providing for a stay of discovery during the pendency of a motion to dismiss, applies to actions commenced in state court under the Securities Act, as well as such actions commenced in federal court." *City of Livonia*, 2019 WL 2293924, at *4. They have also recognized that "[t]he important purpose underlying enactment of the automatic stay—ensuring that cases have merit at the outset—should not be disregarded merely because a federal cause of action is being prosecuted in state court." *In re Greensky, Inc. Sec. Litig.*, 2019 WL 6310525, at *2.

But many other courts have reached the opposite conclusion, holding that the discovery-stay provision does not apply in state court. *See In re Dentsply Sirona, Inc.*, No. 155393/2018, 2019 WL 3526142, at *6 (N.Y. Sup. Ct. Aug. 2, 2019); Case Management Order, *Plymouth Cnty. Contributory v. Adams Pharms., Inc.*, No. RG19018715 (Cal. Super. Ct. July 16, 2019) (attached at Stay App. 86a-87a); *In re PPDAI Group Sec. Litig.*, 116 N.Y.S.3d 865, at *6-*7 (N.Y. Sup. Ct. 2019); *Switzer v. W.R. Hambrecht & Co.*, Nos. CGC-18-564904, CGC-18-565324, 2018 WL 4704776, at *1 (Cal. Super. Ct. Sept. 19, 2018); Order Denying Motion to Stay Proceedings, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. April 1, 2016)

(attached at Stay App. 89a-92a); *In re Pacific Biosciences of California Inc.*, No. CIV509210, 2012 WL 1932469 (Cal. Super. Ct. May 25, 2012); *see also* Klausner et al., *State Section 11 Litigation*, *supra*, at 1773 n.16 (citing two additional unreported decisions, *Beaver Cnty. Emps. Ret. Fund v. VHCP Mgmt., LLC*, No. CIV536488 (Cal. Super. Ct. Dec. 7, 2015) and *Geller v. Morris*, No. CIV537300 (Cal. Super. Ct. Feb. 26, 2016), as refusing to enforce the stay provision). Four additional unreported cases were submitted to the trial court by Plaintiffs as coming down on their side of this divide. Stay App. 83a, 93a-110a (attaching decisions). Some courts have refused to apply the discovery-stay provision because they believed that applying it to "state court actions would undermine *Cyan*'s holding that [Securities Act] cases can proceed in state courts." *In re Dentsply Sirona, Inc.*, 2019 WL 3526142, at *6. Others have reasoned that the "provision for a discovery stay is of a procedural nature, and therefore only applies to actions filed in federal court, not state court." *Switzer*, 2018 WL 4704776, at *1.

The trial court's decision here repeats much of this mistaken reasoning and only deepens this conflict, which extends well beyond the reported decisions cited here. Disputes on this issue tend to go unreported and state court orders of this nature are often electronically unavailable or otherwise uncollectible. *See, e.g., City of Livonia,* 2019 WL 2293924, at *5 n.2 (noting existence of "unreported decisions" "reach[ing] contrary decisions"). And because the vast majority of state securities class actions are filed in either New York or California, the mounting disagreement within the courts of those states means that the lion's share of state court securities

litigation is conducted under a cloud of uncertainty about what law will apply. *See* Klausner et al., *State Section 11 Litigation*, *supra*, at 1774-75 (since *Cyan*, 73% of state court Securities Act filings relating to registration statements have been in those two jurisdictions).

In *Cyan*, this Court granted certiorari in similar circumstances to clarify another question of statutory interpretation that had divided trial courts nationwide. 138 S. Ct. at 1068-69. There, the question was the meaning of the Securities Act's grant of concurrent jurisdiction over Securities Act claims, an issue that only one appellate court, an intermediate state appellate court, had ever addressed. *Id.* at 1069 n.1. But state trial courts and federal district courts had reached divergent conclusions, and further appellate decisions were unlikely. And there, as here, a California trial court had further deepened the split on the question, and the California Court of Appeal and the California Supreme Court had summarily refused to intervene. *Id.* at 1068. Recognizing the importance of ensuring the consistent application of the federal securities laws, this Court granted review. *Id.* at 1069.

The relevant circumstances are the same here. Without this Court's review, the conflict among state trial courts on this question of federal law will persist because the issue, by its nature, evades appellate review. No federal appellate court will ever address this question, as it arises only in state court. And the likelihood a state appellate court will consider the issue is even lower than it was in *Cyan*. Although a defendant might have conceivably raised the jurisdictional issue in *Cyan* on appeal from a state court's final judgment, a defendant could never demonstrate

that violation of the Reform Act's discovery stay affected a judgment against it, thus rendering appellate relief impossible. *E.g.*, CAL. CONST., art. VI, § 13 (imposing strict rule of harmless error review for all judgments); N.Y. C.P.L.R. § 2002 (same). That, of course, is assuming that such a suit would ever progress to final judgment in the first place: the vast majority of Securities Act cases that survive a motion to dismiss settle. *See* Michael Klausner et al., *When Are Securities Class Actions Dismissed, When Do They Settle, and For How Much? An Update*, PLUS Journal, April 2013, at 1, 2.

As a result of all this, the only means for appellate consideration of the Reform Act's discovery stay is a discretionary petition for interlocutory review to a state appellate court—sought during the relatively short pleadings stage of the litigation. But as this case demonstrates, not even that path is viable as a practical matter. Indeed, in the more than 25 years since the Reform Act was enacted, not a single state appellate court has considered whether the statute's discovery stay applies in state court. It is time for this Court to step in.

This issue is of critical importance to securities litigation. After *Cyan* confirmed in 2018 that Congress intended to permit state courts to retain concurrent jurisdiction over Securities Act claims, the number of Securities Act cases filed in state courts multiplied. *See* Klausner et al., *State Section 11 Litigation*, *supra*, at 1775. And these state court cases are far more likely to lack merit than their federal counterparts. *See id.* at 1782 ("the leniency of state court rules appears to have attracted cases to state court that are weaker than those brought in federal

court"). The consequences of the continued uncertainty about the application of the Reform Act's discovery stay in state court are thus increasingly significant.

That is all the more true because the costs of each individual suit, and not just the total number of suits, are likewise increasing. Cases filed in recent years "threaten much higher litigation and settlement costs than cases filed in prior years—nearly three times larger than the average for 1997 to 2017." U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* 2 (Feb. 2019). Indeed, the cost of discovery in these cases is routinely in the millions of dollars.

And while companies that issue securities are subjected to individual suits, the investment banks that underwrite securities offerings are subjected to repeated suits. Here, for example, the Underwriter Applicants estimate that, in just the three years since *Cyan*, they cumulatively have been named as defendants in individual and consolidated actions under the Securities Act in state court at least 287 times—or, counting the number of complaints filed within each individual and consolidated action, cumulatively at least 640 times. *See* Stay App. 175a-219a (listing docket entries of representative post-*Cyan* Securities Act suits filed against Underwriter Applicants in state courts nationwide). Four of the Underwriter Applicants have faced more than thirty-five such individual or consolidated actions; two have faced between twenty and thirty; and five have faced between ten and twenty. *Ibid.*

The increased costs associated with securities litigation have significant consequences. Securities Act defendants are coerced into settling meritless claims.

See Klausner et al., *State Section 11 Litigation*, *supra*, at 1781-82. Premiums for directors' and officers' liability insurance have skyrocketed. *See* Carl E. Metzger & Brian H. Mukherjee, *Challenging Times: The Hardening D&O Insurance Market*, Harvard Law School Forum on Corporate Governance (Jan. 29, 2020). And companies with greater exposure to securities litigation have been forced to hold significantly more cash on hand while reducing capital expenditures. Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. Fin. & Quantitative Analysis 251, 272-73 (2015). Some U.S. companies may avoid going public altogether, depriving the public of valuable investment opportunities. *See* Michael Wusterhorn & Gregory Zuckerman, *Fewer Listed Companies: Is that Good or Bad for Stock Markets?* WALL STREET JOURNAL (Jan. 4, 2018). If Securities Act plaintiffs can evade the Reform Act's discovery limitations merely by filing suit in state court, the costs of such litigation—and the adverse consequences that result—will only increase.

Congress enacted Section 77z-1(b)(1) to address these negative consequences. In passing the Reform Act, Congress was concerned that securities plaintiffs might "abuse * * * the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle." H.R. CONF. REP. NO. 104-369, at 31 (1995). The Conference Report expressly noted that by some estimates, "discovery costs account for roughly 80% of total litigation costs in securities fraud cases" and that "the threat that the time of key employees will be spent responding to discovery requests, including providing deposition testimony, often forces coercive settlements."

Id. at 37; *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 , 741 (1975) (recognizing similar concerns associated with the high costs of discovery in securities cases). Section 77z-1(b)(1) was thus designed "to prevent unnecessary imposition of discovery costs on defendants" and to ensure that plaintiffs were not using discovery as a fishing expedition on the slim hope of finding some viable claim. H.R. CONF. REP. NO. 104-369, at 32; S. REP. NO. 104-98, at 14 (1995). Allowing such discovery to proceed in state courts subverts those aims.

Finally, this case presents an excellent vehicle for the Court to address this question. The parties fully briefed the application of the Reform Act's discovery stay before the trial court. Unlike many other trial courts, the court here issued a written decision explaining its ruling. And the issue presented will remain reviewable no matter how the trial court rules on Applicants' pending demurrer. If the trial court grants Applicants' demurrer with leave to amend, that likely would be followed by another demurrer, during the pendency of which the trial court would continue to allow Plaintiffs to take discovery barred by the Reform Act. Even if Applicants' demurrer is resolved without leave to amend, this Court should still answer the question presented: the issue is "capable of repetition, yet evading review" as it necessarily arises during a brief period at the outset of litigation and these Applicants are repeatedly subjected to state-court Securities Act claims. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *see* Stay App. 175a-219a. If anything, the brief litigation window in which this issue arises and the practical

difficulty of securing any appellate review of the question counsel in favor of granting review here.

In sum, state trial courts are sharply divided on an important question of federal law. Many have adopted an atextual reading of a federal statute that defeats Congress's purpose of reducing the costs associated with securities litigation and minimizing coercive settlements of baseless claims. Given the absence of any viable path for appellate review of this question, there is no reason to await further percolation. The petition being filed today provides the Court with the opportunity to clarify that issue and restore the statutory scheme Congress intended. These circumstances give rise to "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth*, 558 U.S. at 190.

II. A FAIR PROSPECT EXISTS THAT THIS COURT WILL REVERSE

A "fair prospect" also exists that this Court will reverse the trial court's order because it conflicts with the Reform Act's plain language, purpose, and history. *Hollingsworth*, 558 U.S. at 190. No viable argument supports a contrary conclusion.

A. The Reform Act's Discovery Stay Applies In State Court

"In any statutory construction case, [this Court] start[s], of course, with the statutory text." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (internal quotation marks and citation omitted). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted).

The discovery-stay provision's language is unambiguous: it governs in state as well as federal courts. The provision applies "[i]n *any private action arising under* this subchapter"—the Securities Act. 15 U.S.C. § 77z-1(b)(1) (emphasis added); *see Atl. Richfield*, 140 S. Ct. at 1350 ("In the mine run of cases, '[a] suit arises under the law that creates the cause of action.'") (citation omitted). By its terms, the provision applies in "any"—that means, *any*—action asserting Securities Act claims. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("any other term of imprisonment" includes "those imposed by state courts," as well as federal courts because "'any other term of imprisonment' 'means what it says'"); *Collector of Internal Revenue v. Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1870) ("it is quite clear" that a statute prohibiting the filing of suit "*in any court*" "includes the State courts as well as the Federal courts" (emphasis in original)). A Securities Act suit in state court is just as much a "private action arising under" the Securities Act as a Securities Act suit in federal court. The discovery-stay provision thus applies in both. Here, because the trial court has not yet ruled on the sufficiency of the complaint, the Reform Act's mandate is clear: "all discovery and other proceedings shall be stayed." 15 U.S.C. § 77z-1(b)(1).

Surrounding provisions of the Reform Act confirm the discovery stay's application to state court. In contrast to Section 77z-1(b)'s discovery-stay provision, the immediately preceding statutory subsection, Section 77z-1(a), limits its requirements to "each private action arising under this subchapter that is brought as a plaintiff *class action pursuant to the Federal Rules of Civil Procedure*." 15 U.S.C. § 77z-1(a) (emphasis added) (establishing requirements for, among other things, the

appointment of lead plaintiffs and class notice). Thus, unlike subsection (b), subsection (a) does not apply to all actions "arising under" the Securities Act, but rather the *subset* of those Securities Act actions brought as class actions in federal court. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). Just so here: if Congress had meant to stay discovery only in actions governed by the federal rules, it would have said so.

This Court's decision in *Cyan* fortifies this plain-text reading. There, referring to suits under the Securities Act, the Court noted that some provisions of the Reform Act "appl[y] only when such a suit was brought in federal court." *Cyan*, 138 S. Ct. at 1066-67. As an example, the Court cited a sub-provision contained in Section 77z-1(a), which (as the Court observed) applies "in any class action brought under the Federal Rules of Civil Procedure." *Id.* at 1067. By contrast, the Court explained, some of the Reform Act's provisions "appl[y] even when a [Securities] Act suit [is] brought in state court." *Id.* at 1066. As an example, the Court cited Section 77z-2, the Reform Act's "safe harbor" for forward-looking statements. *Id.* at 1066, 1072. Using language identical to that in Section 77z-1(b)'s discovery stay, Section 77z-2 governs "any private action arising under this subchapter." 15 U.S.C. § 77z-2(c)(1), (f). "Generally, identical words used in different parts of the same statute are * * * presumed to have the same meaning." *Robers v. United States*, 572

U.S. 639, 643 (2014) (internal quotation marks omitted). Just as the Reform Act's safe harbor applies in state court, so too does its discovery stay.

The purpose and historical context of the Reform Act reinforce the discovery stay's application to state courts. As described above (*supra* pp. 19-20), Congress designed the stay to prevent plaintiffs from imposing unnecessary costs through discovery before a determination that they had even managed to state a claim. In the years preceding the Reform Act, plaintiffs had used the Securities Act to extract settlements from deep-pocketed defendants. *Merrill Lynch, Pierce, Fenner & Smith Inc.,* 547 U.S. at 81. Congress sought to eliminate the sort of burdensome discovery costs that might coerce defendants into settlement. H.R. CONF. REP. NO. 104-369, at 31 (1995). Congress also sought to prevent plaintiffs from "fil[ing] frivolous lawsuits in order to conduct discovery in the hopes of finding a sustainable claim not alleged in the complaint." S. REP. NO. 104-98, at 14 (1995).

These concerns apply equally to state and federal court actions. There is thus no reason to think that Congress would have intended the discovery stay to apply in one forum but not the other. Instead, Congress intended Section 77z-1(b) to do what it says: stay "all discovery and other proceedings" in Securities Act actions (15 U.S.C. § 77z-1(b)), no matter the court where the defendants find themselves.

B. No Viable Rationale Supports Applying The Discovery Stay Only In Federal Court

Notwithstanding Section 77z-1(b)'s unambiguous language, some trial courts, like the one here, have held the provision inapplicable in state court. None of the trial court's reasons for doing so withstand scrutiny.

First, the trial court emphasized that Section 77z-1(b) contains no "reference to state courts." Stay App. 4a. But such a "reference" would be superfluous given the provision's express application to "any private action." 15 U.S.C. § 77z-1(b)(1). "The word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (citation omitted). It is unnecessary to use the words "state court," because the word "any" "means what it says." *Ibid*. (internal quotation marks omitted).

And the lack of reference to "state court" in the discovery-stay provision is unsurprising, as the provision's focus is the type of "action," not the forum in which that action is litigated. The discovery-stay provision makes no mention of "federal court" either. That is in contrast to other provisions the trial court cited, which reference the courts and other venues to which they apply because they are not limited to any particular type of action. *See* Stay App. 4a (discussing Section 77z-1(a)(7)(B)(iii), which limits the admissibility of certain required disclosures "in any Federal or State judicial action or administrative proceeding"). And again, when the Court in *Cyan* considered a provision that, like the discovery stay, applies to "any private action arising under this subchapter," the Court concluded that provision necessarily "applie[s] even when a [Securities] Act suit was brought in state court." *Cyan*, 138 S. Ct. at 1066 (discussing 15 U.S.C. § 77z-2).

Second, the trial court, citing provisions other than Section 77z-1(b), declared that the Reform Act "consistently limits its procedural provisions to action[s] under the Federal Rules of Civil Procedure and is replete with procedural devices and

associated federal nomenclature." Stay App. 4a. That some Reform Act provisions are limited to federal court does not mean that the discovery-stay provision is as well. *See Cyan*, 138 S. Ct. at 1066-67, 1072 (explaining that some Reform Act provisions apply in state court while others do not). Just the opposite—the fact that other Reform Act provisions are expressly limited to federal court makes clear that the discovery stay, which contains no such language, is not. Congress knew how to limit the Reform Act's provisions to federal court when it wanted to. *See Russello*, 464 U.S. at 23.

Third, the trial court asserted that reading the Reform Act's discovery stay to apply in state court would render Section 77z-1(b)(4) "redundant." Stay App. 5a. Congress added the referenced provision as part of SLUSA, three years after the Reform Act. It provides that "a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection." 15 U.S.C. § 77z-1(b)(4). Contrary to the trial court's conclusion, this provision would not have been superfluous if the Reform Act's discovery stay already applied in state courts. While the Reform Act's discovery stay applies only in actions arising under the Securities Act, the SLUSA stay provision applies to "any private action in a State court," including those cases, for example, that do not arise under the Securities Act because they involve only state-law claims. *Ibid.; see, e.g., In re DPL Inc., Sec. Litig.* 247 F.Supp.2d 946, 948-50 (S.D. Ohio 2003) (noting that this SLUSA provision applies to "discovery in '*any private action*' pending in state court" and staying

discovery in parallel state court action raising claims under state law (emphasis in original)). The SLUSA stay provision would also apply where the Reform Act's discovery stay has either expired or not been enforced.

Fourth, the trial court concluded that the Reform Act's discovery stay applies only in federal court because it is "of [a] procedural nature" and is not "substantive." Stay App. 5a-6a. But even assuming the discovery-stay provision should be characterized as "procedural," nothing precludes Congress from applying "procedural" requirements in state courts. In particular, Congress may require state courts to adjudicate federal claims, and to use some federal procedures when doing so. *See Testa v. Katt*, 330 U.S. 386, 392-94 (1947) (Supremacy Clause requires state courts to enforce federal claims over which they have concurrent jurisdiction); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (holding that the statutory right to a jury trial in actions under the Federal Employers' Liability Act applies in Ohio state court despite a state procedural rule requiring that certain factual questions be decided by the court). Here, the federal statute so provides—the Reform Act expressly applies its discovery stay to "*any* private action." 15 U.S.C. § 77z-1(b)(1) (emphasis added).

Nothing in *Cyan* undermines that conclusion. *Contra* Stay App. 5a-6a. To be sure, *Cyan* characterized some of the Reform Act provisions that are expressly limited to federal court as "procedural," and others that were not so limited as "substantive." *Cyan*, 138 S. Ct. at 1066, 1072. But it nowhere suggested that deciding whether a particular Reform Act provision applies in state court depends on some *Erie*-like

analysis of whether that provision is "substantive" or "procedural." *Cf. Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("[c]lassification of a law as 'substantive' or 'procedural'" can be "a challenging endeavor"). Rather, the question turns on Congress's intent—which is best illustrated by the plain language of the statutory text, not some amorphous distinction between substance and procedure. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

And as *Cyan* itself made clear, when Congress stated in the Reform Act that a provision governed "any private action arising under" the Securities Act, it intended that provision to apply in state court even if it could be deemed "procedural." *See Cyan*, 138 S. Ct. at 1066; 1072. Indeed, the safe harbor provision that *Cyan* described as substantive and as applying in state court has its own discovery stay, which provides that "[i]n any private action arising under this subchapter, the court shall stay discovery," (with certain exceptions) "during the pendency of any motion by a defendant for summary judgment that is based on the grounds that" the complaint challenges statements falling within the safe harbor. 15 U.S.C. § 77z-2(f).

Fifth, the purported "legislative history" on which the trial court relied provides no support for its atextual reading. Stay App. 6a-7a. To start, the materials the trial court cited are not "legislative history" at all, but rather the minutes and materials of the Advisory Committee on Civil Rules, a body entirely distinct from Congress. *See* Advisory Committee on Civil Rules, *Minutes* 1-31 (Apr. 28-29, 1994). They provide no indication of Congress's intent. But even if the cited materials were relevant, they merely characterized the discovery stay as "procedural." The statutory

text governs here, and nowhere does it say that a provision someone might characterize as "procedural" vanishes when a plaintiff files suit in in state court. *See* 15 U.S.C. § 77z-1(b).

In sum, while the trial court has added itself to one side of the ever-growing conflict on the scope of the Reform Act's discovery-stay provision, the court identified no good reason to reject the statute's plain meaning. Congress directed that discovery be stayed in "any private action arising under" the Securities Act, 15 U.S.C. § 77z-1(b), and that mandate applies in both state and federal court.

III. WITHOUT A STAY, APPLICANTS WILL SUFFER IRREPARABLE HARM

In the absence of a stay, Applicants will suffer irreparable harm. Subject to exceptions not relevant here, the Reform Act grants Securities Act defendants, like Applicants, a statutory right to avoid discovery unless the complaint withstands dismissal. Unless this Court stays discovery, Applicants will be irreparably deprived of that statutory right. No "adequate compensatory or other corrective relief will be available at a later date"—Applicants cannot possibly seek any remedy for the burdens of the mountainous discovery they will be forced to produce or the coercive settlement pressure they will experience. *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 850-51 (7th Cir. 2010) (defendant cannot "recoup the expense of responding to [plaintiff's] extravagant discovery requests" and "its remedy at law against settlement extortion [is] nonexistent"), *cert. granted, judgment vacated on other grounds*, 564 U.S. 1032 (2011). And on an appeal from any final judgment, Applicants will be unable to secure

reversal for the violation because of California courts' stringent harmless error rule. *E.g.*, CAL. CONST., art. VI, § 13. Because Applicants' statutory right will thus be "effectively lost," judicial intervention is warranted now. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The harms that Applicants will suffer take many forms. Most fundamentally, they will lose a statutory right—freedom from discovery and its coercive effect before a court determination that the claims against them are viable. And, as a practical matter, they will face the time and expense of complying with Plaintiffs' onerous discovery requests. Document discovery is now getting underway and Applicants' responses to expansive interrogatories are due in early June. That is no small matter. As detailed above, discovery costs in securities cases are notoriously high, often in the millions of dollars. *See supra* p. 18. This case is no exception: Plaintiffs demand everything from "[a]ll documents and communications related to Pivotal's product offerings," to "[a]ll documents and communications related to the IPO and any services the Underwriter Applicants performed related to the Offering." Stay App. 43a; Stay App. 58a; Stay App. 74a. Plaintiffs also seek to require (among many other things) manual review of potentially hundreds of thousands of documents for responsiveness and privilege and answers from all twenty-six Applicants to numerous special written interrogatories. Stay App. 135a-138a. These broad and invasive discovery demands are the very definition of burdensome. And again, Applicants' discovery costs are not "[m]ere litigation expense," *F.T.C. v. Standard Oil*

Co. of Cal., 449 U.S. 232, 244 (1980) (citation omitted); rather, they are the very burdens Congress sought to lift from defendants' shoulders.

What is more, these costs may soon compel Applicants to suffer the ultimate harm that Congress enacted Section 77z-1(b)(1) to address—pressure to settle meritless claims. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (citation omitted) (finding irreparable harm from coercive settlement pressure). As recounted above (*supra* pp. 19-20), in passing the Reform Act, Congress shared that concern. It worried that securities plaintiffs might "abuse * * * the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle." H.R. CONF. REP. NO. 104-369, at 31 (1995); *see Blue Chip Stamps*, 421 U.S. at 741 (recognizing similar concerns associated with the high costs of discovery in securities cases). Even today, most securities class actions end *before* discovery, if not by a motion to dismiss, then by settlement. *See* Klausner et al., *When Are Securities Class Actions Dismissed*, *supra*, at 2.

Applicants are now subject to that "coercive" pressure. H.R. CONF. REP. NO. 104-369, at 37. They should not be compelled to settle Plaintiffs' meritless claims—claims similar to ones that have already been dismissed in federal court—to avoid the high cost of discovery obligations imposed in violation of federal law. *Cf. Carson v. Am. Brands, Inc.*, 450 U.S. 79, 86-88 & n.14 (1981) (irreparable harm found

where district court order "undermine[d] one of the policies underlying Title VII," namely "encouraging voluntary settlement of employment discrimination claims").

IV. THE BALANCE OF EQUITIES FAVORS A STAY

Finally, the balance of equities also strongly favors a stay. As in previous cases where stays have been granted, "[r]efusing a stay may visit an irreversible harm on applicants," but granting it will "do no permanent injury to respondents." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers). Applicants' rights are time-sensitive. If their statutory right to stay discovery is not honored during the pleadings stage, it is lost forever. Plaintiffs, by contrast, face no serious—let alone irreparable—harm if discovery is stayed. They would be placed in the same position as any number of other plaintiffs in parallel suits, who are similarly barred from seeking discovery until the court has tested the sufficiency of their complaint. Plaintiffs could suffer no cognizable harm by being prevented from seeking discovery for claims that are dismissed on the pleadings. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (plaintiffs cannot "unlock the doors of discovery" unless and until they have stated a claim). And even if Plaintiffs' claims do survive, they would still receive all the discovery to which they are entitled in due course. *Cf. John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (delay in nonmovant's receipt of information under Freedom of Information Act did not justify denial of stay).

V. REQUEST FOR CERTIORARI BRIEFING SCHEDULE

Applicants respectfully request that this Court set a briefing schedule on their petition for a writ of certiorari so that the Court can consider the petition before it recesses for the summer. Applicants are filing this application and their petition on May 3, 2021, within two weeks of their receipt of the California Supreme Court's order (which was distributed by U.S. mail) and in time for the petition to be docketed before May 7, 2021. They thus request that the Court order Plaintiffs to file a response to the certiorari petition no later than June 7, 2021 (with no waiver or extension permitted), so that the petition can circulate on June 8, 2021, in time for the June 24, 2021 conference. Assuming the petition is docketed by May 7, 2021, that schedule would afford Plaintiffs the normal time allowed by this Court's rules to file their response to the certiorari petition, and Applicants will waive their 14 days for a reply.

CONCLUSION

This Court should stay the trial court's order allowing discovery pending this Court's disposition of Applicants' petition for a writ of certiorari and direct Plaintiffs to respond to the petition for a writ of certiorari no later than June 7, 2021. Applicants further request an immediate administrative stay pending resolution of this application.

Respectfully submitted,

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
LENA H. HUGHES
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2100 L Street, NW
Washington, DC 20037
(202) 887-8740
dmaynard@mofo.com

JORDAN ETH
MARK R.S. FOSTER
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Applicants Pivotal Software, Inc., Robert Mee, Cynthia Gaylor, Paul Maritz, Michael Dell, Zane Rowe, Egon Durban, William D. Green, Marcy S. Klevorn, and Khozema Z. Shipchandler

ROMAN MARTINEZ
MELISSA ARBUS SHERRY
ANDREW B. CLUBOK
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Washington, DC 20004

Counsel for Applicants Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Barclays Capital Inc., Credit Suisse Securities (USA) LLC, RBC Capital Markets, LLC, UBS Securities LLC, Wells Fargo Securities LLC, KeyBanc Capital Markets Inc., William Blair & Company, L.L.C., Mischler Financial Group, Inc., Samuel A. Ramirez & Co., Inc., Siebert Cisneros Shank & Co., LLC, and Williams Capital Group, L.P. (the latter two, Siebert Williams Shank & Co., LLC)

MAY 3, 2021

Additional Counsel Listed Below

ELIZBAETH L. DEELEY
GAVIN M. MASUDA
JOSEPH C. HANSEN
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

Counsel for Applicants Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Barclays Capital Inc., Credit Suisse Securities (USA) LLC, RBC Capital Markets, LLC, UBS Securities LLC, Wells Fargo Securities LLC, KeyBanc Capital Markets Inc., William Blair & Company, L.L.C., Mischler Financial Group, Inc., Samuel A. Ramirez & Co., Inc., Siebert Cisneros Shank & Co., LLC, and Williams Capital Group, L.P. (the latter two, Siebert Williams Shank & Co., LLC)

JOHN L. LATHAM
ANDREW T. SUMNER
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309

GIDON M. CAINE
ALSTON & BIRD LLP
1950 University Avenue
Suite 430
East Palo Alto, CA 94303

Counsel for Applicant Dell Technologies Inc.