No. 20-1541

In the Supreme Court of the United States

PIVOTAL SOFTWARE, INC., ET AL.,
Applicants-Petitioners,

v.

ZHUNG TRAN, ET AL.,
Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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

The Application for a Stay should be denied. This case no longer presents a live controversy over the Question Presented, much less the extraordinary circumstances that would require this Court to superintend a state trial court's management of document discovery in a workaday case. Petitioners argue that 15 U.S.C. § 77z-1(b) (hereinafter, the Stay Provision), requires the state court to stay discovery pending the disposition of their motion to dismiss this action under the Securities Act of 1933, 15 U.S.C. § 77 *et seq.* Respondents, however, have irrevocably committed to adhering to the Stay Provision throughout this case. *See* Appendix A, hereto. In turn, petitioners have acted in reliance on that commitment; they did not provide a document production scheduled for May 10. So, there is not now, and will never be, discovery for this Court to stay. And any ruling by this Court on the merits of the Question Presented would be an impermissible advisory opinion, because the parties already agree that the statute will govern all the proceedings. (To avoid any doubt, respondents also acknowledge that because they have deprived petitioners of a complete opportunity for appellate review, the trial court's ruling cannot have any preclusive effect.)

Respondents are abiding by the Stay Provision for ordinary practical reasons, not to evade review in this Court. The trial court will hold the hearing on petitioners' motion to dismiss (their "demurrer" in local parlance) in just a month—on June 16, 2021. *See* Stay Application (hereinafter, App.) 9. The state court will almost certainly

decide that motion at the hearing or right after—promptly making the Stay Provision irrelevant to the case. Respondents do not much care whether limited discovery continues in the meantime. Petitioners *themselves* opine that respondents have "no meaningful [interest] whatsoever" in that question, because if the state court does not dismiss the case, discovery can then proceed promptly. App. 4. That was an excellent point.

By contrast, if respondents had continued to contest whether the Stay Provision applies to the case and this Court were to grant certiorari, petitioners would seek to stay the *whole case*—likely for at least a year—in order to prevent the trial court from deciding their motion and thereby mooting the Question Presented. Respondents care *a lot* about such a lengthy delay in their ability to pursue their case. So, respondents sensibly gave petitioners everything they wanted by adhering to the Stay Provision; now the case can move forward.

A stay would not have been appropriate anyway, because—wholly apart from the fact that the issue is now moot—this Court is unlikely to grant the certiorari petition, and it is likely to affirm if it does. Start with the conflict. Petitioners admit that no court of appeals has ever decided the issue. App. 17. Petitioners identify no other case where appellate review was even *sought* (which itself shows the question is not very important). They point to less than a handful of non-binding trial court rulings on their side in the time since this Court explained in *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018), that the procedural restrictions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub L. No. 104-67, 109

Stat. 737, apply only in federal court. *Cyan*, 138 S. Ct. at 1066-67. (Given petitioners' emphasis that they are involved in a wide array of litigation under the 1933 Act, App. 18, and the general coordination of the defense bar, their suggestion that there are many more unreported decisions that no one knows about (*id.* at 15) rings hollow.) By contrast, in *Cyan* itself, this Court only granted certiorari in the wake of many more recent conflicting state and federal court rulings. *See* Petition for Writ of Certiorari at 11-17, *Cyan*, 138 S. Ct. 1061 (2018) (No. 15-1439).

The Question Presented is not so important that this Court would expend its limited resources to resolve it based on such a thin conflict among non-binding discovery rulings of a few state trial judges. Only a few dozen state court cases are filed under the Securities Act of 1933 each year. That number will only go down in light of a Delaware Supreme Court ruling that Delaware companies—which make up most of the public companies subject to the 1933 Act—may negate state court jurisdiction through their corporate charters (as explained by the very article on which petitioners heavily rely). *See* Michael Klausner et al., *State Section 11 Litigation in the Post-*Cyan *Environment (Despite* Sciabacucchi*)*, 75 Bus. Law. 1769, 1770 (2020).

The Question Presented is itself even not very important to those few cases. It determines only whether federal law by default imposes an interim stay of discovery. Even if the statute applies, the stay is only presumptive. The state courts can still make appropriate findings and allow discovery to proceed. 15 U.S.C. § 77z-1(b)(1). But even those state courts that do not apply the Stay Provision still regularly limit

discovery or impose a stay under their own procedural rules. Petitioners omit that here, for example, the trial court did not permit pre-demurrer depositions.[1]

Further, the same protections against abusive discovery apply in this context which are sufficient in every other kind of case, and which this Court would never intervene to override as insufficient. *See, e.g.*, Cal. Civ. Proc. Code § 2017.020 ("The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence."). Here too, petitioners' description of respondents' initial document requests is incomplete. It omits that the parties had numerous exchanges to substantially narrow the scope of document discovery; those negotiations were nearly complete by the time petitioners sought a stay here. If petitioners had remained unsatisfied with that narrowing, they would have been free to then seek relief from the trial court. That is a workaday process in

[1] *See also, e.g.*, *Plymouth Contributory Sys. v. Adamas Pharms.*, No. RG19018715, Case Management Order (Alameda Sup. Ct. July 26, 2019) (exercising discretion to limit discovery before hearing on the sufficiency of the pleadings); *In re Cloudera, Inc. Sec. Litig.*, 19CV348674, Order After Hearing on October 25, 2019 (Santa Clara Sup. Ct. Oct. 29, 2019) (same); *In re Maxar Techs., Inc. Shareholder Litig.*, 19CV357070, Order After Hearing on September 24, 2020 (Santa Clara Sup. Ct. Sept. 30, 2020) (exercising discretion to largely stay discovery pending resolution of the pleadings, yet allowing limited discovery coordinated with related federal action); *Okla. Police Pension Fund & Ret. Sys. v. Jagged Peak Energy, Inc.*, No. 2017-CV-31757 (Colo. Dist. Ct., Denver Cnty.) (discovery not sought because Colorado Rules of Civil Procedure 26(d) and 16(b) limit discovery in cases where pleadings have not yet been adjudicated); *In re Natera, Inc. Sec. Litig.*, CIV 537409, Civil Minute Order (San Mateo Sup. Ct. Feb. 8, 2017) (exercising discretion to stay discovery pending resolution of the pleadings and other motions).

thousands of cases every day, not a special crisis requiring this Court's immediate intervention.[2]

Petitioners' argument that defendants will settle securities class actions prior to a ruling on a motion to dismiss if they do not get a mandatory federal stay is thus wildly overstated. They provide no evidence that actually occurs in the real world (and this case is an obvious contrary example).

Cyan again provides a ready contrast to the unimportance of the Question Presented in this case. That case involved the fundamental question whether defendants could remove 1933 Act cases, and thus eliminate the jurisdiction of the state courts over such suits *altogether*. This case involves the minor procedural

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[2] Petitioners' suggestion that the state court should not have permitted discovery to proceed because a federal court dismissed a different 1933 Act case against petitioners is misleading. The two cases have different claims, different theories, different defendants, different requested remedies. The federal case muddled 1933 Act claims with open market fraud claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, all premised on lengthening sales cycles and diminished growth for Pivotal's traditional PAS product offering. The federal fraud case sought only stock drop damages and named only the issuer, officers, and underwriters for the IPO. In contrast, this California state case asserts exclusively non-fraud 1933 Act claims, premised on three unique theories: 1) Pivotal's non-traditional PKS product offering was not integrated with the industry standard, Kubernetes; 2) given massive projected losses, Pivotal's controlling parent, Dell Technologies, Inc. ("Dell"), was already directing Pivotal executives in negotiations to sell off Pivotal to VMware, Inc. (another Dell-controlled subsidiary); and 3) Dell was already directing these undisclosed negotiations to maximize its own tax benefits at the expense of Pivotal shareholders. These unique theories center on the role of the uniquely named defendants, *e.g.*, Dell, and thus seek unique remedies, including an accounting and disgorgement of the unjust gains realized by Dell and the other defendants (*e.g.*, insider sales, commissions, tax windfalls). None of these unique claims, theories, or remedies were ever at issue in, much less addressed by, the distinct federal fraud case.

question whether federal law requires the state courts presumptively to stay discovery temporarily during part of those cases.

But if petitioners are right that the issue is important and comes up a lot, it will be presented here again soon. In that later case, both sides are more likely to care and to litigate it to conclusion. This case involves an unusual delay in appellate review. Initially, petitioners inadequately invoked the Stay Provision, so that it had to be litigated in the trial court and court of appeal *twice*. *See* App. 9-10. That appellate yo-yoing is why the trial court is now on the brink of deciding petitioners' motion to dismiss, and why respondents do not really care about discovery before it does.

The issue should percolate while this Court awaits another vehicle. The Question Presented is woefully undertheorized. Petitioners themselves stress how unusual it was that the trial court even "issued a written opinion explaining its ruling." App. 20. The Question Presented also implicates a constitutional issue that the lower courts should consider first; but none has. Petitioners argue that the Stay Provision dictates procedures for state courts. But as discussed below, such a provision would lack any enumerated fount of authority and would violate the Tenth Amendment.

If the Court were to grant certiorari notwithstanding the absence of a live controversy or a substantial conflict or an important issue, it would affirm on the merits. In the rare instances that Congress intends federal procedural rules to apply in state court, it does so explicitly. Section 77z-1 itself contains a provision that—in

stark contrast to the Stay Provision—expressly "limits the admissibility of certain required disclosures 'in any Federal *or State judicial action* or administrative proceeding.'" App. 25 (quoting 15 U.S.C. § 77z-1(a)(7)(B)(iii)) (emphasis added).

Further, principles of constitutional avoidance (*e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005)) compel reading federal statutes not to impose procedural rules on state courts, when those rules are not part and parcel of a federal right or otherwise preempted. No provision of the Constitution gives Congress the power to impose such mandates, and doing so would effectively conscript the state courts in violation of the Tenth Amendment. *E.g.*, *Guillen v. Pierce County*, 31 P.3d 628, 655 (Wash. 2001) ("Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from . . . allowing pretrial discovery[.]"), *rev'd in part on other grounds*, 537 U.S. 129 (2003).

At the very least, there should be a strong presumption that Congress did not intend federal law to control state judicial procedures. That presumption may be overcome by a plain statement expressly referring to the state courts. This Court has emphasized the "belief in the importance of state control of state judicial procedure," such "that federal law takes the state courts as it finds them." *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). "The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Ibid.* This Court has therefore adopted "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts."

Felder v. Casey, 487 U.S. 131, 138 (1988); *see also Johnson v. Fankell*, 520 U.S. 911 (1997) (declining to overrule a state rule barring the immediate appealability of qualified immunity denials because it was a "neutral state Rule regarding the administration of the state courts"); *Cent. Vt. Ry. v. White*, 238 U.S. 507, 511 (1915) ("There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought."). This Court should be remarkably cautious, then, before deciding that an ambiguous federal procedure applies to state courts.

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952), is not to the contrary. *Contra* App. 27. In *Dice*, the Court had to decide between a federal rule guaranteeing a right to jury trials for Federal Employers' Liability Act ("FELA") cases and a state rule that gave state court judges power to decide certain issues. 342 U.S. at 360-63. The Court held that the jury trial right applied, finding it "part and parcel" of the FELA right and "too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial." *Id.* at 363 (internal quotations omitted). That jury trial right—which the Court *refused* to classify as a local rule of procedure because of its critical importance to the substantive federal right—is not comparable to the stay of discovery at issue here. (And no matter what arguments petitioners present in reply, it remains undeniable that this essential issue has yet to percolate in the lower courts.)

Here, the Stay Provision is at least ambiguous about whether it imposes procedural rules on state courts. The better view is that unelaborated references in Section 77z-1 to "the court"—with no explicit provision addressing the state judiciary—apply only to a federal court. *Cf. Joyce Livestock Co. v. United States*, 156 P.3d 502, 518 (Idaho 2007) (The power of "a court" to award prevailing party fees under 28 U.S.C. § 2412 applies only to federal courts: "Had the Congress intended that the word 'court' also include state courts, it undoubtably would have expressly included them."). Whereas the PSLRA's substantive provisions apply in every case, the procedural provisions apply only in federal court. This Court unanimously read the statute to adopt that distinction in *Cyan*. 138 S. Ct. at 1066-67 (noting that the PSLRA's substantive provisions "applied even when a 1933 Act suit was brought in state court," but that "[o]ther [PSLRA] provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court.").

The procedural provisions are thus filled with references to requirements that apply only in federal court. For example, the limitations on class action litigation apply in "*any*" action, but are limited to cases subject to the Federal Rules of Civil Procedure. 15 U.S.C. § 77z-1(a). Petitioners' argument that "any" action nonetheless refers to state court actions is nonsensical.

Further, in "any" action, the statute requires the court to determine whether the parties and lawyers "violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure" and to impose sanctions for violations of the Rule. 15 U.S.C.

§ 77z-1(c). On petitioners' reading, that requirement applies to state courts, but does so in a manner that is inexplicable: state court litigants cannot violate a *Federal* Rule of Civil Procedure.

There is moreover a good reason that Section 77z-1 uses the phrase "the court" in the ordinary fashion as referring to federal courts applying federal procedural rules. Congress adopted identical provisions governing the 1933 Act (which can be filed in state court) and the 1934 Act (which cannot). *Compare* 15 U.S.C. § 77z-1, *with id.* § 78u-4. If the latter provisions referred to a "federal court," the reference to "federal" would have been surplusage and potentially confusing.

No negative inference arises from the fact that the Stay Provision itself does not expressly reference federal procedural rules. *Contra* App. 26. No express reference is necessary, because the ordinary presumption is that federal law does not govern state court procedure. But in any event, and importantly, the Stay Provision confers a power that can only reasonably be read as limited to federal courts. The statute authorizes a "court" in "any" action under the 1933 Act to issue an order staying discovery in related state litigation. 15 U.S.C. § 77z-1(b)(4). It would be utterly *unheard of*—and *especially* constitutionally dubious—for Congress to grant one state court the power to enjoin proceedings in another. The Stay Provision moreover rests that authority on a *federal* determination to further the first *state* court's "jurisdiction, or to protect or effectuate its judgments." *Ibid.* It is implausible that Congress intended to assert the power to protect state court jurisdiction and

judgments. But that is the necessary consequence of petitioners' position that the Stay Provision applies to every state court case under the 1933 Act.

Petitioners nonetheless argue that the word "any"—in the phase "any private action arising under this subchapter"—overrides all that and *ipso facto* subjects state courts to the Stay Provision. But that is a non sequitur. As discussed, the question is what "courts," not what "actions," must impose a stay. Notably, the statute does not refer to "any court." Petitioners concede, for example, that the limitations on class actions—which equally apply to "any" suit—only apply in federal court. App. 23. For that reason, petitioners err in drawing an analogy to the Reform Act's substantive safe harbor provisions, which apply in "any" action. 15 U.S.C. § 77z-2(c). The "substantive" safe harbor provisions do apply in state court proceedings, *Cyan*, 138 S. Ct. at 1066, but that is because they do not impose any obligation on "the court." (By contrast, the safe harbor includes its own *procedural* stay of discovery that, properly construed, only applies in federal court. 15 U.S.C. § 77z-2(f).)

But in any event, this Court has held over and over that "any" does not always mean "every." Context matters. Petitioners surprisingly fail to mention the most analogous precedent, which held that "any court" did not mean "every court." *Small v. United States*, 544 U.S. 385 (2005). Here, the context demonstrates that the Stay Provision does not apply in state court. At the least, it lacks the plain statement required to impose federal rules on state judicial procedure. *See also Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1745 (2019); *Small*, 544 U.S. at 388 (collecting cases).

Petitioners also argue that Congress's decision to impose the discovery stay in federal court necessarily implies that Congress intended the same rule to apply in state court. But Congress actually decided both (1) to take the very unusual step of making 1933 Act cases non-removable from state court, and (2) to impose multiple procedural requirements only in federal court. The limitations on class actions and the sanctions requirements are *much* more important to securities litigation (including in limiting the pressure on defendants to settle), but—as petitioners concede—do not apply in state court. Obviously, Congress chose to respect the States' authority over their own judicial procedure. Petitioners cannot explain why Congress would nonetheless have intended to abandon that respect only with regard to the Stay Provision (and the parallel trivial right to written interrogatories, 15 U.S.C. § 77z-1(d)), and every indication in the legislative history is that it did not. *See* App. Appendix 6a-7a.

CONCLUSION

The Application for a Stay should be denied.

May 12, 2021

Respectfully submitted,

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APPENDIX A

HEDIN HALL LLP

VIA E-MAIL

May 9, 2021

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Re: *In re Pivotal Software, Inc. Sec. Litig*., Case No. CGC-19-576750 (San Francisco Cty.)

Dear Mark et al.:

On behalf of Plaintiffs, I write regarding discovery ahead of the upcoming June 17, 2021 hearing on Defendants' demurrer and motion to strike.

Plaintiffs irrevocably commit to adhere to the stay provision of 15 U.S.C. § 77z-1(b) in this matter. Accordingly, Plaintiffs withdraw all pending discovery requests pending the disposition of Defendants' pending demurrer. Defendants need not produce any documents tomorrow.

Sincerely,

s/David W. Hall

DAVID W. HALL

CC: Counsel of Record for All Parties