No. 20-1541

IN THE

Supreme Court of the United States

PIVOTAL SOFTWARE, INC., ET AL.,

Petitioners,

v.

ZHUNG TRAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeal for the State of California,
First Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the discovery-stay provision of the Private Securities Litigation Reform Act impose mandates on the procedures of state courts?

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INTRODUCTION

Respondents brought this class action under the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77a *et seq.*, in state court. Petitioners complain that the statute presumptively required the state court to stay discovery during the pendency of their motion to dismiss. The petition should be denied.

This issue is already moot in this case—and will be doubly so soon. Respondents have irrevocably committed themselves to adhering to the Stay Provision, 15 U.S.C. § 77z-1(b). Petitioners therefore have nothing to gain from a favorable answer to the Question Presented, and any ruling from this Court would be advisory. Further, the trial court will have decided petitioners' motion to dismiss (or "demurrer" in local parlance) before this Court would decide the case, making the Stay Provision even more irrelevant to this case as it applies only "during the pendency of any motion to dismiss." *Id.* § 77z-1(b)(1).

In any event, this Court should deny the petition for a host of other reasons. No court of appeals has ever decided this issue—indeed, this may be the only case in which appellate review was even sought—so there is no circuit conflict. The issue is not very important seeing as the provision offers only a temporary stay (which a court can dispense with anyways if it makes certain findings). And the state court's decision was correct—this federal procedural rule does not apply in state courts. At the very least, the question should be allowed to percolate, because the lower courts have yet to address the constitutional issues raised by petitioners' argument.

STATEMENT OF THE CASE

I. Statutory Background

The 1933 Act "promote[s] honest practices in the securities markets" by "requir[ing] companies offering securities to the public to make 'full and fair disclosure' of relevant information." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (quoting *Pinter v. Dahl*, 486 U.S. 622, 646 (1988)). The statute includes a private right of action, concurrent jurisdiction in state and federal courts, and, "[m]ore unusually," a bar on the removal of such actions from state to federal court. *Ibid.*

In 1995, Congress passed the Private Securities Litigation Reform Act ("Reform Act" or "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, which amended both the 1933 Act and the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78a *et seq*. 138 S. Ct. at 1066. "Some of the Reform Act's provisions made substantive changes to the 1933" Act, "and applied even when a 1933 Act suit was brought in state court." *Ibid.* "Other Reform Act provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court." *Id.* at 1066-67.

One Reform Act addition to the 1933 Act was the discovery-stay provision at issue here, which provides:

> 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 particular-

> ized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 77z-1(b)(1).[1] The applicability of that provision to state court proceedings raising 1933 Act claims is the subject of this dispute.

II. Factual Background

1. Pivotal was a subsidiary controlled by Dell Technologies, Inc. ("Dell") "that provided software platforms that purported to allow customers to efficiently develop and launch applications without the complexity of building or maintaining their own technological infrastructure." First Am. Consolidated Compl. ("Compl.") ¶ 2. Pivotal's "flagship product" was the Pivotal Cloud Foundry ("PCF"), *ibid.*, a subscription-based software program that assisted with building and operating cloud-based software and applications, *id.* ¶ 16. Ahead of Pivotal's initial public offering ("IPO"), however, the industry shifted to the Kubernetes standard, "render[ing] Pivotal's principal component offering, Pivotal Application Service ("PAS"), obsolete, requiring Pivotal to launch a new product, Pivotal Container Service ("PKS"), which supposedly allowed enterprises the ability to deploy and operate Kubernetes." *Id.* ¶ 2.

2. Pivotal went public in April 2018. Compl. ¶ 1. It "pitched the IPO on the supposed 'cutting-edge' technical capabilities of these component offerings."

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[1] The Reform Act also added a nearly identical provision to the 1934 Act, *see* 15 U.S.C. § 78u-4(b)(3)(B), which regulates the subsequent trading of stocks and gives exclusive jurisdiction to federal courts to resolve private causes of action, *Cyan*, 134 S. Ct. at 1066.

Id. ¶ 3. The Registration Statement made reference to Pivotal's "leading cloud native platform," and represented that the PCF platform "combined the latest innovations from open-source projects such as application containers," "enabled large enterprises to leverage the benefits of cutting-edge open-source technologies," and had "a built-in advanced container networking and security engine." *Ibid.* (brackets and emphasis omitted). It also represented that Pivotal's offerings "integrate PCF with leading open-source projects such as Kubernetes," characterized the PKS product as "Kubernetes-based" and as "allow[ing] enterprises to deploy and operate Kubernetes," and "touted the supposed 'market opportunities' for Pivotal's current offerings." *Ibid.* (brackets and emphasis omitted).

In reality, "none of Pivotal's products were genuinely integrated with Kubernetes." Compl. ¶ 4. PAS was incompatible with Kubernetes, and PKS was not, in fact, "Kubernetes-based." *Ibid*. Instead, as detailed in the Complaint, the "PKS offering completely lacked, and was designed without, numerous features critical for any viable integration with Kubernetes." *Id.* ¶ 5. Given that the company lacked offerings compatible with the industry standard, it is unsurprising that "by the time of the IPO, Pivotal's bookings were already deteriorating, deferred sales and lengthening sales cycles were kneecapping growth, and Pivotal" internally projected net operating losses for the foreseeable future. *Id.* ¶ 6.

Pivotal's first quarter ended in May 2019, and the results were "severely unfavorable." Compl. ¶ 125. In June 2019, Pivotal lowered its going-forward guidance, and its stock price "plummeted, *falling 41%* from $18.54 down to $10.89 per share." *Id.* ¶¶ 125-30.

3. Back in January 2017, over a year before the IPO, Dell recognized that Pivotal was not sustainable on its own and directed principals at Pivotal and VMware (another Dell-controlled subsidiary) to negotiate a merger. Compl. ¶ 7. The merger was approved in August 2019. *Id.* ¶¶ 148-49. "[B]y timing the Merger to occur after Pivotal's shares suffered a significant decline," Dell was able to "roll its Pivotal equity into VMware at an extremely beneficial discount," and obtain valuable tax treatment. *Id.* ¶ 152. These defendants therefore "exploit[ed] ordinary Pivotal shareholders twice-over." *Id.* ¶ 8. First, they sold the IPO to the public "on false claims of Kubernetes-integration, cutting-edge products, and purported growth." *Ibid.* Then, once Pivotal's shares dropped, Dell pushed through the merger, acquiring 80% ownership of both companies at a discount, "along with the millions in tax savings that Dell had been targeting all along." *Ibid.* All told, plaintiffs suffered severe losses while defendants were unjustly enriched by over $638 million. *Id.* ¶ 9.

III. Procedural Background

1. In light of those events, plaintiffs subsequently brought this litigation in California Superior Court on behalf of those who acquired Pivotal stock in the IPO.[2] The Complaint alleged strict liability claims

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[2] There was also a putative class action suit filed in federal court, which was dismissed. *See In re Pivotal Sec. Litig.*, No. 3:19-CV-03589-CRB, 2020 WL 4193384, at *1 (N.D. Cal. July 21, 2020). Any suggestion that the state court should not have permitted discovery to proceed because the federal court dismissed this different 1933 Act case against petitioners would be misleading. The two cases have different claims, different

under Sections 11, 12(a)(2), and 15 of the 1933 Act against Pivotal, Dell, certain Pivotal and Dell officers and directors, and the IPO underwriters. Compl. ¶ 1. "Section 11 of the Act promotes compliance with [the 1933 Act's] disclosure provisions by giving purchasers a right of action against an issuer or designated individuals (directors, partners, underwriters, and so forth) for material misstatements or omissions in registrations statements," and "the buyer need not prove . . . that the defendant acted with any intent to deceive or defraud." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015). "Section 12(a)(2) provides similar redress where the securities at issue were sold using prospectuses or oral communications that contain material

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theories, different defendants, different requested remedies. The federal case muddled 1933 Act claims with open market fraud claims under the 1934 Act, 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 was already directing Pivotal executives in negotiations to sell off Pivotal to VMware; 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.

misrepresentations or omissions," and like Section 11 claims, plaintiffs "need not allege scienter, reliance, or loss causation." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). "Section 15, in turn, creates liability for individuals or entities that 'control any person liable' under section 11 or 12." *Id.* at 358 (quoting 15 U.S.C. § 77*o*) (brackets omitted).

2. In October 2020, the parties filed a Joint Case Management Conference Statement in which the defendants requested that the Court stay discovery pursuant to the Reform Act, which plaintiffs opposed. Pet. App. 3a. At the Conference, the trial court heard the parties on the stay request, and issued an Order denying the stay so that bilateral written discovery could proceed. *Ibid.* The court also set a hearing on defendants' demurrer. *Ibid.*

In December, defendants filed a petition for writ of mandate in the California Court of Appeal seeking a stay of discovery. Pet. App. 3a. The court denied the petition, noting that "petitioners did not thoroughly present the positions urged in the present petition by way of a stay motion," and "such a motion represents another, unexhausted, adequate remedy at law available to petitioners. *Ibid.* (brackets omitted). Finally, in January 2021, defendants filed a stay motion. *Id.* at 3a-4a.

In March 2021, the trial court denied defendants' motion to stay discovery, holding that the Stay Provision did not apply. Pet. App. 1a-12a. The court first considered the language of the Reform Act and the provision, noting that the "complete absence of any reference to state courts stands in contrast to other provisions in the PSLRA that do make explicit reference to state courts." Pet. App. 6a. The court went on: "This

suggests that in drafting the PSLRA, Congress was explicit where it intended the statute's provisions to reach state courts. The sheer lack of any express direction in the text of the PSLRA discovery stay strongly indicates that it was never intended to apply in state court." *Ibid.*

The trial court next determined that interpreting the stay provision to apply only in federal court better aligned with the statutory scheme. For example, it recognized that the Reform Act "as a whole consistently limits its procedural provisions to action under the Federal Rules of Civil Procedure and is replete with procedural devices and associated federal nomenclature." Pet. App. 7a. It also found its reading better in line with the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227. SLUSA amended the 1933 Act to provide that "upon a proper showing, 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." Pet. App. 7a-8a (quoting 15 U.S.C. § 77z-1(b)(4)) (brackets omitted). The court explained that "[i]f the PSLRA's discovery stay already provided for an automatic stay of discovery in state court securities cases, there would have been no need to enact Section 27(b)(1) of SLUSA to give federal courts the power to stay discovery in related state securities cases." *Id.* at 8a.

The trial court also found its interpretation consistent with this Court's *Cyan* decision. In *Cyan*, this Court distinguished between the substantive provisions of the Reform Act, which "applied even when a 1933 Act suit was brought in state court," and "[o]ther

Reform Act provisions [which] modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court." 138 S. Ct. at 1066-67. The court below reasoned that "the PSLRA discovery stay is procedural, not substantive," because "it merely prescribes a process for gathering evidence," and "thus does not apply in state court." Pet. App. 10a. Finally, the court found that "[t]he legislative history of the PSLRA supports the Court's conclusion," and that as a historical matter, because "no significant class action litigation was brought in state court prior to the PSLRA," Congress would have been "focused on remedying the problem of discovery abuses in federal courts, not state courts." *Id.* at 10a-12a. The court therefore denied defendants' motion. *Id.* at 12a.

3. Petitioners then sought a writ of mandate and stay from the California Court of Appeal, which it summarily denied without a written opinion. Pet. App. 13a. The California Supreme Court did the same. *Id.* at 14a. The present petition for certiorari followed. Petitioners then filed an application with this Court to stay the trial court's order (20A164), which it later withdrew because petitioners had agreed to abide by the Stay Provision.

REASONS FOR DENYING THE WRIT

I. This Issue Is Moot.

1. Under Article III of the Constitution, this Court has "authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). What this means is that "[i]n our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." *Ibid.* This Court has made

clear that an "'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Id.* at 90-91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

It is true that voluntary compliance does not always moot a case. 568 U.S. at 91. Rather, the party claiming mootness must show that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). This is called the "voluntary cessation doctrine." *Id.* at 93. Respondents can make that showing here.

This case is comparable to *Already*, a trademark case in which this Court held as moot "the competitor's action to have the trademark declared invalid." 568 U.S. at 88, 93. Nike had issued an "unconditional and irrevocable" covenant not to sue Already. *Id.* at 88-89, 93. The Court held that the covenant sufficiently mooted the case because it "encompasse[d] all of its allegedly unlawful conduct," *id.* at 94, so Nike could not raise against Already any trademark claims based on Already's existing shoe designs and therefore "Already's only legally cognizable injury . . . [could not] reasonably be expected to recur," *id.* at 100.

The same reasoning readily applies here. Petitioners have come to this Court complaining because

respondents were seeking discovery ahead of the resolution of the motion to dismiss. But no longer. Respondents have "irrevocably commit[ted] to adher[ing] to the stay provision . . . in this matter." Opp. to Stay Appl. App. A. In turn, petitioners have acted in reliance on that commitment; they did not provide a document production scheduled for May 10. And respondents' commitment will last throughout the entirety of this case, even in the event the state court grants petitioners' motion to dismiss with leave to amend and respondents file a new complaint. So, there is not now, nor will there ever be, discovery for this Court to stay. In other words, there is nothing this Court could give petitioners by answering the Question Presented in their favor. The *only* thing this Court could provide is an advisory opinion, and advisory opinions are anathema to Article III.[3]

Petitioners may come back in the reply and argue that respondents are abiding by the Stay Provision in order to evade review in this Court. That would not be an exception to Article III if it were true, but it is not. In reality, respondents have a very rational reason for this choice. The trial court will hold a hearing on the motion to dismiss later this summer, after which the Stay Provision becomes meaningless. And respondents do not much care about the limited discovery that could have occurred in the meantime. Petitioners themselves recognized that respondents have "no meaningful [interest] whatsoever" in that question,

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[3] 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.

because if the state court does not dismiss the case, discovery can then proceed promptly. Stay Appl. 4. But respondents do care about a year-long delay in their ability to pursue their case should this Court grant the petition and stay the case in the meantime. When weighing limited additional discovery against a year of delay, respondents made the obvious choice.

2. Regardless of respondents' commitment to abide by the Stay Provision, this issue would have soon become moot anyway. The state court will hold the hearing on petitioners' motion to dismiss on August 2.[4] The state court will very likely decide the motion at the hearing or right after. Because the Stay Provision only applies during the pleading stage, 15 U.S.C. § 77z-1(b)(1), this question will thus be utterly meaningless well before this Court could resolve the case on the merits. The only way that inevitable mootness could have been avoided was a stay, and petitioners dropped their stay request in this Court.

Petitioners answer that, despite all of this, the Court could decide the issue under the "capable of repetition, yet evading review" doctrine. Pet. 27. They cannot satisfy that standard. To fall under that exception to the live controversy requirement, which "applies 'only in exceptional situations,'" the following must be met: "(1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that the same complaining party will be subject to the

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[4] The hearing was supposed to be held June 16, 2021. After withdrawing their request for a stay in this Court, petitioners sought and received an extension of the hearing date until August 2.

same action again.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)) (brackets omitted).

The first prong is not met here because this issue could be fully litigated prior to cessation. Classic "capable of repetition yet evading review" cases revolve around judicially unstoppable events like elections or the conclusion of a pregnancy. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *Roe v. Wade*, 410 U.S. 113, 125 (1973). Unlike those instances, here, there is a mechanism by which courts could hear this question: the issuance of a stay. *See, e.g.*, *St. Pierre v. United States*, 319 U.S. 41, 43 (1943) (holding a case as moot where petitioner "did not apply to this Court for a stay"). Petitioners apparently themselves believed this was an avenue through which this Court could decide the issue seeing as they applied for a stay. Had petitioners maintained that application in this Court and had it been granted, this Court could have decided the issue (except for, of course, the *other* mootness issue present in this particular case). As to the second prong, Pivotal has not explained how it reasonably expects to be on the other side of a state Securities Act suit now that it has completed its IPO. This doctrine does not save this issue from its inevitable mootness, and in any event, it is already moot for the first reason explained above.

3. Even if this Court is not sure that the question is moot, these issues are at least serious vehicle problems for actually resolving the Question Presented. Before this Court could answer whether the Stay Provision applies in state court, it would first need to go through a robust mootness inquiry. And

there is a prospect that at least several Members of this Court will determine the case is moot and therefore not cast votes on the merits, leaving the question unresolved. Further, this Court would benefit from adversarial presentation from parties that actually have a stake in the outcome of the case. A case in which the parties are not actively fighting over the outcome anymore is an objectively bad vehicle. Even if this question were certworthy (it's not), this is plainly not the case through which to resolve it.

II. There Is No Circuit Conflict.

No court of appeals has ever decided this issue. Petitioners identified no state high court decision either. In fact, petitioners cite to no appellate decision at all. Instead, they discuss a handful of trial court rulings on their side in the time since this Court explained in *Cyan* that the Reform Act's procedural restrictions apply only in federal court.[5] There is just no mature, developed conflict here that requires this Court's time and attention.

Petitioners try to get around this major flaw in two ways. First, they point to this Court's grant in *Cyan* itself. Pet. 14-15. But this case is not *Cyan*, not by a longshot. With respect to the existence of a conflict, the Court there 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, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138

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[5] Given petitioners' emphasis that they are involved in a wide array of litigation under the 1933 Act, Stay Appl. 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.

S. Ct. 1061 (2018) (No. 15-1439). And, of course, the Question Presented in *Cyan*—whether state courts retained subject matter jurisdiction over 1933 Act claims—was far more important than a temporary discovery stay question. Second, petitioners suggest that appellate court review won't happen in the future, Pet. 15-16, but there is reason to think otherwise. As petitioners themselves note, "a discretionary petition for interlocutory review to a state appellate court," is an option. Pet. 16. But contrary to what petitioners say, this case is not a good example of that path not being viable. 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 supra* 7. That appellate yo-yoing is why the trial court is now close to deciding petitioners' motion to dismiss.[6]

Even if this purported conflict does one day require this Court's attention, surely more percolation is needed. The Question Presented is woefully undertheorized. Petitioners themselves stress how unusual it was that the trial court even "issued a written decision explaining its ruling." Stay Appl. 20. The Question Presented also implicates a constitutional issue, *see infra* 19-21, that the lower courts should address first; but none has. Further consideration in the state court systems would also help illuminate the merits of this issue. As petitioners themselves note, the majority of

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[6] 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, Pet. 25-26, is wildly overstated. They provide no evidence that actually occurs in the real world (and this case is an obvious contrary example).

state securities litigation occurs in New York and California. Pet. 14. This Court should at least give those state courts more time to work through this issue and coalesce around a rule. But as of this moment, little has been written about this question and few courts have considered it. This Court ought to wait until the potential arguments have been developed and tested so that it is better equipped to address the question.

III. The Question Presented Is Of No Recurring Importance.

The Question Presented is not so important that this Court should expend its limited resources to resolve it based on such a thin conflict. Only a few dozen state court cases are filed under the 1933 Act each year. Alexander Sasha Aganin, *Securities Class Action Filings—2019 Year in Review*, Harv. L. Sch. F. on Corp. Governance (Feb. 14, 2020), https://bit.ly/341EWRm (thirty-two state court 1933 Act class action filings in 2018 and forty-nine in 2019). And that number could 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 not even 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). And 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.[7]

Petitioners expend much energy bemoaning the burdens associated with discovery. Pet. 24-26. But what they neglect to mention are the state protections already in place to prevent overly burdensome discovery. The same guards 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(a) ("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 re-

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[7] *See, e.g.*, *Plymouth Cnty. Contributory Ret. Sys. v. Adamas Pharms., Inc.*, No. RG19018715, Case Management Order (Cal. Super. Ct. July 18, 2019) (exercising discretion to limit discovery before hearing on the sufficiency of the pleadings); *In re Cloudera, Inc. Sec. Litig.*, No. 19CV348674, 2019 WL 5789317 (Cal. Super. Ct. Oct. 29, 2019) (same); *In re Maxar Techs., Inc. Shareholder Litig.*, No. 19CV357070, 2020 WL 8513877 (Cal. Super. Ct. Sept. 30, 2020) (exercising discretion to largely stay discovery pending resolution of the pleadings, yet allowing limited discovery coordinated with related federal action); *In re Natera, Inc. Sec. Litig.*, No. CIV 537409, Minute Order (Cal. Super. Ct. Feb. 8, 2017) (exercising discretion to stay discovery pending resolution of the pleadings and other motions); *see also* Colo. R. Civ. P. 26(d) and 16(b) (limiting discovery in cases where pleadings have not yet been adjudicated).

quests 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 thousands of cases every day.

Finally, *Cyan* again provides a ready contrast to the unimportance of the Question Presented in this case. To be sure, this Court granted certiorari there without the kind of robust circuit conflict it normally requires. But it only did so in light of the importance of the question. 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 question whether federal law requires the state courts presumptively to stay discovery temporarily during the earliest stage of those cases—not exactly comparable issues.

IV. The State Court's Decision Is Correct.

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. Indeed, 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." 15 U.S.C. § 77z-1(a)(7)(B)(iii)) (emphasis added). The total lack of any express reference to state courts in the Stay Provision,

combined with the general presumption that federal procedural law does not apply in state court, compels the conclusion that the provision applies in federal courts alone.

1. 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, at least when those rules are not part and parcel of a federal right or otherwise do not clearly preempt the state rules.[8] Doing so risks effectively conscripting the state courts in violation of the Tenth Amendment, and damages the federalism and sovereignty principles embedded in our constitutional structure. *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*

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[8] While the line between substantive and procedural can sometimes be tricky, there is no question that this provision is procedural. As the court below noted, the provision "(1) does not alter the range of conduct or the class of persons that the Securities Act punishes or (2) modify the elements of a Securities Act claim." Pet. App. 9a. Instead, the rule merely regulates the timing of discovery.

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, and this provision does not meet that standard.

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952), is not to the contrary. *Contra* Stay Appl. 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 specifically *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.

Contrary to petitioners, then, there *is* good "reason to think that Congress would have intended the discovery stay to apply in one forum but not the other." Pet. 19. That reason is respect for the province of States to create their own rules of judicial procedure. But no matter what arguments petitioners present in reply, it remains undeniable that this essential issue has yet to percolate in the lower courts.

2. 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 to each private action arising under this subchapter," but are limited to cases subject to the Federal Rules of Civil Procedure. 15 U.S.C. § 77z-1(a)(1). 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)(2). 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. Petitioners' argument that "any" action nonetheless refers to state court actions is nonsensical.

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; *see also Cyan*, 138 S. Ct. at 1066 (explaining that the 1933 Act authorizes state court jurisdiction, while the 1934 Act does not). If the latter provisions referred to a "federal court," the reference to "federal" would have been surplusage and potentially confusing. Another reason may be, as the state trial court suggested, that state court class actions under the 1933 Act are a more recent trend, so there is little reason to think Congress saw a problem in the state courts that needed fixing. If that's true, the solution is not for this Court to impose the Stay

Provision on state courts, but instead for Congress to consider whether adding it would be worth the loss to state sovereignty that would come with doing so.

No negative inference arises from the fact that 15 U.S.C. §77z-1(b)(1) itself does not expressly reference federal procedural rules. *Contra* Stay Appl. 26. No express reference is necessary, because the ordinary presumption is that federal law does not govern state court procedure. But in any event, the stay of discovery subsection of the statute actually *does* reference the Federal Rules of Civil Procedure:

> During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 77z-1(b)(2). Because it is exceedingly unlikely that Congress would have incorporated the federal rules by analogy, the reference to those rules is powerful evidence that the provision was only meant to apply in federal court.

Moreover, 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.

3. 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 one of the limitations on class actions—which equally apply to "any" suit—only apply in federal court. Stay Appl. 23 (quoting *Cyan*, 138 S. Ct. at 1067). 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, because (1) they are substantive (because they limit the conduct for which one could be found liable under the statute); and (2) 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). There, this Court answered whether the phrase "convicted in any court" in 18 U.S.C. § 922(g)(1) "appl[ies] only to convictions entered in any *domestic* court or to *foreign* convictions as well?" 544 U.S. at 387. The Court "h[eld] that the phrase encompasses only domestic, not foreign, convictions." *Ibid.* To reach that conclusion, it explicitly held that "[t]he word 'any' considered alone cannot answer this question." *Id.* at 388. Instead, the Court looked to context. For example, the Court considered the presumption against extraterritoriality, the surrounding text, legislative history, and the statute's purpose to reach its conclusion. *Id.* at 388-94.

And *Small* is not the only example. Indeed, the *Small* Court itself collected myriad other examples of narrower interpretations of "any." *See* 544 U.S. at 388 ("'[G]eneral words,' such as the word 'any,' must 'be limited' in their application 'to those objects to which the legislature intended to apply them'") (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.)); *ibid.* ("'any' means 'different things depending upon the setting'") (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004)); *ibid.* ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute") (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994)); *ibid.* ("it is doubtful that the phrase 'any statute' includes the very statute in which

the words appear") (quoting *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15-16 (1981)); *ibid.* ("'[A]ny sum,' while a 'catchall' phrase, does not 'define what it catches'") (quoting *Flora v. United States*, 362 U.S. 145, 149 (1960)) (all brackets in original). And more recently, in *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1750-51 (2019), this Court reaffirmed that principle, again applying "context" to the word "any" to find a narrower meaning to the word.

Applied here, it is clear "any" does not reach state courts. As in *Small*, there is a presumption that persuasively dictates the narrower meaning of "any"—here, the presumption that federal procedural law does not apply in state court.

Finally, petitioners 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* Pet. App. 10a-12a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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