No. 20-1541

In the Supreme Court of the United States

PIVOTAL SOFTWARE, INC., et al.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, et al.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Society for Corporate Governance (the "Society") is a professional association of more than 3,400 governance professionals who serve approximately 1,500 public, private, and not-for-profit companies across a wide range of sizes and industries. Its members support the work of corporate boards and executives in connection with corporate governance and disclosure obligations, compliance with corporate and securities laws and regulations, and stock-exchange listing requirements. The Society's mission is to shape corporate governance through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through better governance.

The question presented in this case is of critical importance to the Society and its members, who are often on the front lines of responding to discovery requests in lawsuits brought under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* ("Securities Act"). In the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (the "Reform Act"), Congress provided that in "any private action arising under" the Securities Act, discovery is stayed during the pendency of a motion to dismiss. 15 U.S.C. § 77z-1(b)(1). Notwithstanding the straightforward and unambiguous meaning of the words "any private action,"

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, this brief has been filed with the written consent of all parties.

the court below held that the automatic stay of discovery does not apply to Securities Act claims filed in state courts. Pet. App. 1a-12a.

That holding is of particular concern to the Society and its membership, which includes governance professionals at many public companies that are named as defendants in Securities Act lawsuits. In recent years, public companies have faced a marked increase in the number of such claims filed in state court, a development that has heightened the practical importance of ensuring that the discovery stay applies in federal and state courts alike, as the statutory text, structure, purpose, and history uniformly indicate that it should. A contrary rule would invite forum-shopping by opportunistic plaintiffs, and subject public companies to coercive pressure to settle even meritless claims, or endure substantial discovery burdens even before a court has assessed the facial validity of a plaintiff's claims. That outcome cannot be reconciled with the statutory text, and would partially nullify one of the Reform Act's key protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress enacted the Reform Act's discovery-stay provision to prevent securities plaintiffs from weaponizing discovery to coerce defendants into settling meritless claims. Like the court below, the Plaintiffs here misconstrue the statutory text in a manner that would permit the imposition of the same undue discovery burdens that Congress sought to curb through the Reform Act. As Petitioners explain, every tool of statutory construction—text, structure, context, purpose, and history—supports the same conclusion:

that the discovery stay applies in both state and federal courts. See Pet. Br. 15-22. As a matter of statutory interpretation, this is an easy case.

Practical realities underscore the importance of applying the statute as written so that the discovery stay applies in state court. A contrary rule would invite plaintiffs to forum-shop for state courts where they can inflict burdensome discovery on defendants before the facial viability of their claims has been put to the test. When state courts fail to apply the Reform Act's stay provision, defendants face discovery-related burdens that can lead to coercive settlements—one of the problems that Congress sought to curtail through the passage of the Reform Act. State courts, in turn, will face a barrage of motion practice, as defendants are forced to file *ad hoc* motions to stay discovery or to challenge the scope of discovery requests, prior to the court ruling on a motion to dismiss—wasting resources of the courts and the parties.

2. Respondents have attempted to downplay the negative consequences of their preferred rule by citing *Salzberg* v. *Sciabacucchi*, 227 A.3d 102 (Del. 2020), where the Delaware Supreme Court upheld the validity of federal forum selection provisions for Securities Act claims against Delaware corporations. Br. in Opp. 16. But that decision does not insulate defendants nationwide against the negative effects of state courts that ignore the Reform Act's automatic discovery stay. Courts outside of Delaware have not yet addressed the question under their respective state laws, and even for Delaware, *Sciabacucchi* did not hold that all such forum selection clauses are inherently valid. In short, *Sciabacucchi* does not mitigate or even address the

negative practical effects of Respondents' flawed statutory interpretation.

3. As Petitioners have explained, the decision below rests, in part, on a misreading of *Cyan, Inc.* v. *Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1066, 1072 (2018). Contrary to Respondents' suggestion, nothing in *Cyan* justifies ignoring the plain text of § 77z-1(b)(1), let alone replacing it with a vague dichotomy between "procedural" and "substantive" provisions. This Court should instead apply the statute as written, and hold that "any private action" encompasses suits filed in state court. Even if this Court were to treat as relevant whether the discovery-stay provision can be characterized as "procedural" or "substantive," in this particular context, the provision is best understood as a substantive part of the Reform Act.

ARGUMENT

I. The Discovery Stay Is an Essential Bulwark Against Plaintiffs Coercing Settlements Through Costly Discovery Obligations.

A. The Statutory Text and Structure Make Clear That the Discovery Stay Applies in Both Federal and State Courts.

As Petitioners explain, every relevant tool of statutory construction supports a single conclusion here: that the discovery stay applies in "any private action" arising under the Securities Act, including those in state court. See Pet. Br. 15-22.

"Statutory interpretation, as [this Court] always say[s], begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). In providing that "[i]n *any private*

action arising under [the Securities Act], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss," 15 U.S.C. § 77z-1(b)(1) (emphasis added), Congress used words that are "simple, plain, and unambiguous." *In re Everquote, Inc. Sec. Litig.*, 106 N.Y.S.3d 828, 834 (N.Y. Sup. Ct. 2019). Nothing in the statutory language limits the discovery-stay provision only to a "private action" brought in federal court. *Id.* at 837. To the contrary, as this Court has recognized in different contexts, "Congress' use of the word 'any' suggests an intent to use [the modified phrase, here 'private action'] 'expansive[ly].'" *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1774 (2019) (quoting *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008)). In short, "'[t]he statute says what it says—or perhaps better put here, does not say what it does not say.'" *Everquote*, 106 N.Y.S.3d at 835 (quoting *Cyan*, 138 S. Ct. at 1069); accord *City of Livonia Retiree Health and Disability Benefits Plan* v. *Pitney Bowes Inc.*, No. X08 FST CV 18 6038160 S., 2019 WL 2293924, at *4 (Conn. Super. Ct. May 15, 2019) (holding that the plain meaning of "any private action" "compels the conclusion" that the Reform Act's discovery-stay provision applies to actions filed in state court).

Statutory context and structure confirm the point. The text of § 77z-1(b)(1) aligns closely with the statutory safe harbor for forward-looking statements in 15 U.S.C. § 77z-2(c)(1) and (f), which apply "in any private action arising under th[e] [Securities Act]." In *Cyan*, this Court specifically found that § 77z-2 applies "even when a [Securities] Act suit was brought in state court." 138 S. Ct. at 1066. As other courts have correctly recognized, because this Court has "held that

language identical to that at issue here [in the discovery-stay provision] applies to both state and federal actions commenced under the Securities Act," it necessarily follows that the discovery-stay provision "was meant to apply to actions pending in state court as well as in federal court." *City of Livonia*, 2019 WL 2293924, at *4.

Other contextual indicators are to the same effect. The text of the discovery stay in § 77z-1(b)(1) contrasts with a neighboring provision of the Reform Act, 15 U.S.C. § 77z-1(a)(1), which applies to "each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." That provision's explicit reference to the Federal Rules "makes clear" that § 77z-1(a)(1) applies only to actions in federal court. *City of Livonia*, 2019 WL 2293924, at *4. In electing not to include the same limitation in § 77z-1(b)(1), Congress made clear that the discovery-stay provision applies equally to actions pending in state court. *Id.* (citing *Clay* v. *United States,* 537 U.S. 522, 528-529 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we have recognized it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

B. The Adverse Practical Consequences of Respondents' Reading Underscore Why That Reading Would Frustrate the Statutory Purpose and History.

Members of the Society have direct, first-hand experience with the financial and logistical burdens im-

posed on public companies by burdensome early discovery requests in securities litigation, and the coercive effect that premature discovery can have in forcing settlements of meritless claims. See John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 574 (2010). Document production is expensive, time-consuming, and poses a risk of disclosure of confidential and proprietary information that would otherwise be unavailable to a plaintiff. *Id.* at 550-552. In the same vein, the significant time required to gather information to answer interrogatories and prepare for depositions obviously imposes a substantial burden on defendants. *Id.* at 594.

Congress was acutely aware of these burdens, and focused on mitigating them when it enacted the Reform Act. As courts have recognized, Congress included the Reform Act's discovery-stay provision for two principal reasons. See *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004). First, Congress sought to prevent plaintiffs from filing securities actions with the intention of using the discovery process to coerce settlements. See H.R. Rep. No. 369, 104th Cong., 1st Sess. 37 (1995) (Conf. Rep.). At the time, discovery costs accounted for approximately 80 percent of total litigation costs in securities cases, which often forced "innocent parties to settle frivolous securities class actions." *Ibid.*; accord *Novak* v. *Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) ("Legislators were apparently motivated in large part by a perceived need to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries.").

Second, Congress intended the discovery stay to prevent plaintiffs from commencing securities litigation "to conduct discovery in the hopes of finding a sustainable claim not alleged in the complaint." S. Rep. No. 98, 104th Cong., 1st Sess. 14 (1995); accord *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 263 (2d Cir. 1993) (explaining "interest in deterring the use of the litigation process as a device for extracting undeserved settlements as the price of avoiding * * * extensive discovery costs").

This Court, too, has recognized that plaintiffs sometimes bring groundless claims under federal securities laws "to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (referring to such coercive discovery practices as a "social cost rather than a benefit"); see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-164 (2008) (declining to extend liability under § 10(b) of the Securities Exchange Act of 1934 to individuals upon whose statements plaintiffs had not relied, expressing concern that doing so would, among other things, expose more defendants to extensive discovery, uncertainty, and disruption and "allow plaintiffs with weak claims to extort settlements from innocent companies").

The practical experiences of Society members reinforce Congress's concerns. Because the Securities Act provides for jurisdiction anywhere a defendant transacts business, see 15 U.S.C. § 77v, and given the nationwide operations of many public companies,

plaintiffs can often forum-shop, selecting a state court venue that they believe is less likely to apply the discovery stay. Indeed, empirical data demonstrate that Securities Act plaintiffs have increasingly preferred state courts to federal courts subsequent to this Court's holding in *Cyan* that Securities Act claims brought in state court are not removable to federal court. Between March 20, 2018 (when *Cyan* was decided), and December 31, 2019, the total volume of litigation under Section 11 of the Securities Act increased. See Michael Klausner et al., *State Section 11 Litigation in the Post-*Cyan *Environment (Despite* Sciabacucchi), 75 Bus. Law. 1769, 1776 (2020).[2] Yet the number of Section 11 cases filed exclusively in federal court has dropped significantly, because post-*Cyan*, plaintiffs have increasingly chosen to file such claims in state court. Including cases with a parallel federal filing, 71 percent of Securities Act cases were filed in state court in the 18 months following *Cyan*, compared to only 35 percent for the preceding four years. *Id.* at 1775.[3]

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[2] This analysis comes from the Stanford Securities Litigation Analytics database and covers "securities class actions filed in federal and state court against publicly traded companies between January 1, 2011, and December 31, 2019, that allege misstatements or omissions related to public offerings of securities in violation of either section 11 or 12 of the Securities Act." *Id.* at 1771, n.7. The increase in Section 11 litigation is not attributed to a higher volume of public offerings. *Id.* at 1776.

[3] While 2020 and the first half of 2021 saw a decline in Section 11 suits, that development may be attributable, at least in part, to the uncertainties created by the Covid-19 pandemic. See Cornerstone Research, Securities Class Action Filings 2021 Midyear Assessment 1 (2021), https://bit.ly/3zb1CfO;

In the experience of the Society and its members, plaintiffs in Securities Act lawsuits in state courts often seek wide-ranging discovery at the outset of a case, imposing major burdens on public companies, their officers, and other defendants. As Petitioners note, the plaintiffs' discovery demands in this case were extreme, seeking "[a]ll documents and communications related to Pivotal's product offerings," and "[a]ll documents and communications distributed at, used during, created in connection with, or concerning any meeting involving any Pivotal management or executives," among other things. Pet. Br. 8-9. Other examples abound of the size and coercive effect of uncontrolled discovery costs. *E.g.*, John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 Bus. Law. 1101, 1112-1113 (1996) (describing several examples from congressional testimony prior to enactment of Reform Act where companies spent millions of dollars responding to expansive discovery requests before suits were dismissed or settled).

The discovery burdens are particularly acute in securities cases, where "almost all discovery material is in the hands of the defendants," which creates a "disparity [that] means that the corporation's costs are significantly higher than the plaintiffs' costs." Jessica Erickson, *Investing in Corporate Procedure*, 99 B.U. L. Rev. 1367, 1382 (2019). Thus, even where a defendant believes claims are meritless, it may "rationally pay to settle the case rather than incur the high costs of discovery." *Ibid.*

Cornerstone Research, Securities Class Action Filings 2020 Year in Review 1 (2020), https://bit.ly/3yaOki7.

Unfortunately, overbroad discovery demands remain commonplace today. Beyond imposing costs and other burdens on defendants, they strain the resources of the court system by generating a predictable cycle of motion practice that could be avoided if state courts faithfully applied the plain and unambiguous language of the Reform Act's discovery stay.

II. *Sciabacucchi* Does Not Eliminate the Negative Practical Consequences of Respondents' Position.

In opposing certiorari, Plaintiffs suggested that their (mis)reading of the statute will not have meaningful negative practical consequences, because Delaware companies may "negate" state court jurisdiction through forum-selection clauses in their corporate charters. Br. in Opp. 16. In particular, in *Sciabacucchi*, the Supreme Court of Delaware recently upheld the validity of federal forum provisions in corporate charters requiring any Securities Act claims to be filed in federal court. See 227 A.3d at 113-138. But to the extent Respondents suggest that *Sciabacucchi* mitigates the effects of their interpretation of the Reform Act's automatic discovery stay, they are mistaken.

As an initial matter, the Delaware Supreme Court considered a "facial" rather than an "as applied" challenge to forum-selection provisions. 227 A.3d at 135. In upholding the facial validity of those terms, the court did not consider other "hypothetical, contextual situations regarding the adoption or application of [such provisions]." *Ibid.* Thus, *Sciabacucchi* leaves open the possibility that federal forum-selection provisions will not be enforced in certain contexts, meaning

that even a Delaware corporation with a federal forum-selection provision in its charter may need to defend Securities Act claims in state court. Moreover, most other states have not yet addressed the validity of forum-selection charter provisions under their respective laws.

Other corollary questions remain to be litigated. For instance, two California courts recently found forum-selection provisions to be enforceable, but disagreed about which defendants can invoke them. See *Wong* v. *Restoration Robotics, Inc.*, Case No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020); *In re Uber Technologies Sec. Litig.*, Case No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020), available at https://bit.ly/3sCpIO9. In *Wong*, the court dismissed claims against a corporation and its directors and officers based on a federal forum-selection provision, but allowed the action to proceed in state court against the underwriter and venture capital defendants, explaining that neither were signatories to the certificate of incorporation that contained the forum-selection clause. See *Wong*, Case No. 18-CIV-02609 at 2-3, 44. By contrast, in *Uber Technologies*, the court granted the underwriter-defendants' motion to dismiss, even though they were not parties to the charter containing the forum-selection provision, reasoning that the forum-selection provision applied to "any complaint" asserting Securities Act claims. *Uber Technologies*, Case No. CGC-19-579544 at 14.

While this Court need not attempt to predict how state appellate and high courts may resolve these and other questions prospectively, the simple point remains: the ongoing litigation and divergent results highlight that *Sciabacucchi* is not a nationwide or

even generally effective bulwark against the kind of abusive state court discovery burdens that Plaintiffs seek to validate through this suit. This Court should confirm that the Reform Act's discovery-stay provision means what it says, including in state court. Doing so will remove incentives for plaintiffs to forum-shop for discovery-friendly jurisdictions, and will shield litigants and courts from having to deal with costly and time-consuming discovery disputes at the outset of a Securities Act lawsuit that might not survive beyond a motion to dismiss.

III. This Court Should Resolve This Case Based on the Plain Statutory Text, But to the Extent It Reaches the Issue, the Discovery Stay Is Substantive, Not Procedural.

This Court should apply the unambiguous text of the statute as written, and hold that "any private action" encompasses suits filed in state courts. See Pet. Br. 15-36. In attempting to avoid that straightforward textual conclusion, Plaintiffs, like the court below, rely on a misreading of this Court's decision in *Cyan*. See Br. in Opp. 21-22. Contrary to Respondents' suggestion, nothing in *Cyan* justifies replacing the plain text of § 77z-1(b)(1) with a vague dichotomy between "procedural" and "substantive" provisions. See Pet. Br. 36-37. But to the extent that this Court ascribes relevance to the question of whether the discovery-stay provision is "procedural" or "substantive," as explained below it is best understood as an important substantive part of the Reform Act.

There is no mechanical dividing line between substance and procedure. See, *e.g.*, *Gasperini* v. *Ctr. for*

Humanities, Inc., 518 U.S. 415, 427 (1996) ("Classification of a law as 'substantive' or 'procedural' for [*Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)] purposes is sometimes a challenging endeavor."). A provision that appears procedural in one context may be substantive in another, because "[t]he line between 'substance' and 'procedure' shifts as the legal context changes." *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965).

In distinguishing substance from procedure, courts should seek to ensure that the outcome of litigation would be the same whether litigated in a federal or state court. *Guaranty Tr. Co.* v. *York*, 326 U.S. 99, 109 (1945). And courts should "be guided" by the goals of "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Gasperini*, 518 U.S. at 428 (internal quotation marks and citation omitted).

Applying these guiding principles, the discovery-stay provision is substantive. First, if the Reform Act's discovery stay applies in both federal and state courts while a motion to dismiss is pending, plaintiffs will have fewer incentives to forum-shop. Second, because early discovery in state court can coerce defendants to settle even meritless claims that would have been subject to an early pre-discovery dismissal in a federal court, treating the provision as procedural would lead to an inequitable administration of the Securities Act.

Congress enacted the Reform Act's discovery-stay provision to prevent plaintiffs from using aggressive discovery tactics to coerce settlements or engage in fishing expeditions before a complaint has been tested for facial validity. In this context, the discovery-stay provision is best understood not as a generalized pro-

cedural rule, but rather as a targeted correction, intended to influence substantive outcomes in the adjudication of liability under the Securities Act. This is a quintessentially substantive end. See *Gasperini*, 518 U.S. at 427-430 (state statute containing procedural instruction—the standard for judicial review of the size of jury awards—had a substantive objective because review of jury verdicts impacts the substantive rights of parties); accord *S.A. Healy Co.* v. *Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995) (explaining that even where a rule is "undeniably 'procedural' in the ordinary sense of the term" but is "limited to a particular substantive area, such as contract law," the rule is intended to "influence substantive outcomes" and this purpose would be defeated if litigants could simply avoid the rule through their choice of forum).

Here, relief from the distorting effects of early discovery is part and parcel of the federal interests advanced by the Reform Act. Indeed, the provision of that very relief is what explicitly animated the passage of the Reform Act. The discovery process "is an integral part of the legal framework governing proceedings," and "[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.*, No. 655626/2018, 2019 WL 6310525, at *2 (N.Y. Sup. Ct. Nov. 25, 2019) (internal quotation marks and citation omitted).

The discovery stay is a central part of the Reform Act. It should not be treated as the equivalent of a

mere local rule of procedure that is inferior to a patchwork of state and local discovery guidelines. Failing to apply the discovery-stay provision in state court deprives Securities Act defendants of a vital substantive right to be free from the compulsion to give confidential and proprietary information to hostile litigation adversaries unless those adversaries surpass certain substantive thresholds in pleading their cases.

CONCLUSION

For the foregoing reasons, and those in Petitioners' Brief, the Court should hold that the Reform Act's discovery-stay provision applies to Securities Act claims brought in state courts.

Respectfully submitted.

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