

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CYAN, INC., ET AL.,)
 Petitioners,)
 v.) No. 15-1439
BEAVER COUNTY EMPLOYEES RETIREMENT)
FUND, ET AL.,)
 Respondents.)
- - - - -

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10 Washington, D.C.
11 Tuesday, November 28, 2017

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:04 a.m.

16
17 APPEARANCES:
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19 behalf of the Petitioners
20 ALLON KEDEM, Assistant to the Solicitor General,
21 Department of Justice, Washington D.C.; on behalf
22 of the United States, as amicus curiae, in support
23 of affirmance
24 THOMAS C. GOLDSTEIN, Bethesda, Maryland; on
25 behalf of the Respondents

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 15-1439,
5 Cyan versus Beaver County Employees Retirement
6 Fund.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL
9 ON BEHALF OF THE PETITIONERS

10 MR. KATYAL: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Congress in 1998 reacted to a new
13 problem. After its 1995 Reform Act, which
14 dealt with the crisis of abuse of federal
15 claims in federal court, plaintiffs had
16 responded by shifting their litigation to state
17 court. The upshot was that the pre-'95 abuses
18 were happening; they were just happening in
19 state court.

20 Congress, in the Securities Litigation
21 Uniform Standards Act, SLUSA, took three steps.
22 First, it precluded certain causes of action.
23 Second, it modified its anti-removal bar. And,
24 third, it eliminated concurrent jurisdiction
25 for many '33 Act federal claims in state court.

1 Respondents disagree with this third
2 one, but the text, structure, and purpose are
3 all against them. And the best way of
4 understanding our argument is this: If Beaver
5 County brought the exact same complaint that
6 they did here, alleging a federal '33 Act
7 claim, but did one thing differently, they also
8 brought a state law claim, they'd be knocked
9 out of state court. That's their own reading.

10 But, they say, because they didn't
11 bring their state law count, they are now --
12 the state law claim, they are now entitled to
13 bring their federal claim in state court.

14 JUSTICE GINSBURG: Mr. Katyal --

15 MR. KATYAL: That makes zero sense.

16 JUSTICE GINSBURG: Well, one could
17 say, with respect to your argument, that
18 Congress chose a rather obtuse way of saying
19 that federal courts shall have exclusive
20 jurisdiction. It could have simply said, in
21 covered class actions related to claims under
22 the '33 Act, federal courts shall have
23 exclusive jurisdiction, period, and that would
24 be clear and everybody would understand and you
25 would prevail.

1 But the Congress certainly took a odd
2 route to getting there.

3 MR. KATYAL: Justice Ginsburg, we
4 agree with you that this is an obtuse way of
5 getting there. And, you know, this body could
6 have written a much better statute than our
7 friends across the street or so on, but I do
8 think it's the best way of understanding the
9 text. I'll explain why in a moment.

10 And as I was saying a moment before,
11 the anomaly on the other side is far worse.
12 This would then -- in no other statute that
13 they point to, that I've ever heard of, does
14 bringing a state count force you out of state
15 court, but that's their reading. And if
16 Congress is going to do something that strange,
17 you would expect them to have said so --

18 JUSTICE SOTOMAYOR: I'm sorry, I
19 thought the whole purpose, the main purpose, of
20 SLUSA was just that, to ensure that claims of
21 this particular type were not covered under
22 state law but covered under federal law. If I
23 accept that that was the main purpose of
24 Congress's position, what difference does it
25 make who adjudicates the claim if both courts

1 are going to be bound by federal law?

2 MR. KATYAL: Justice Sotomayor, we
3 disagree with the premise and what it
4 eventually leads you to in your -- in your
5 question to me in terms of your conclusion. So
6 we disagree that the main purpose was
7 preclusion of state claims. They pointed to
8 nothing saying so. And I'll walk you through
9 the actual statutory findings in the text of
10 the statute which I think rebel at that.

11 And then even if it were a main
12 purpose to deal with the precluded claims,
13 there's certainly nothing to exclude, and I
14 think there's legislative history and the
15 statute itself is pretty clear that Congress
16 also had in mind the abuse that was going on
17 because these federal claims were being brought
18 to -- were being brought in state court. And,
19 you know, the text of the statute itself,
20 Justice Sotomayor, says that.

21 JUSTICE SOTOMAYOR: Doesn't your --
22 doesn't your reading contain an inherent
23 contradiction? If the first clause is supposed
24 to preclude or give exclusive jurisdiction to
25 the district courts over all covered class

1 actions, which under your reading includes even
2 those that are not federal --

3 MR. KATYAL: Yes.

4 JUSTICE SOTOMAYOR: -- why then have
5 the second "except"? Isn't there a tension
6 between the two?

7 MR. KATYAL: No, I don't think there's
8 a tension. As our reply brief, you know, I
9 think, outlines, it's exactly actually the
10 compromise that was struck in the '34 Exchange
11 Act because the Exchange Act --

12 JUSTICE SOTOMAYOR: Well, you're --
13 there's an inherent tension in the two "except"
14 clauses otherwise. You're giving -- you're
15 saying the second "except" helps you, but --

16 MR. KATYAL: I don't --

17 JUSTICE SOTOMAYOR: -- they're
18 contradictory on that.

19 MR. KATYAL: I don't think they're
20 contradictory. I think that what our reading
21 does is leave the '33 and '34 Acts in exactly
22 the same position; that is to say that both of
23 them say if you're bringing a federal claim,
24 either '33 or '34, you can't bring it in state
25 court. You're ousted of jurisdiction.

1 JUSTICE SOTOMAYOR: I'm sorry. Your
2 -- your -- your reading of that first "except"
3 clause --

4 MR. KATYAL: Uh-huh.

5 JUSTICE SOTOMAYOR: -- is that it
6 covers all covered class actions as defined in
7 p(f)(2). P(f)(2) defines covered class actions
8 only as those that have 50 or --

9 MR. KATYAL: Correct.

10 JUSTICE SOTOMAYOR: -- 50 or more
11 people, a certain amount of damages.

12 MR. KATYAL: Correct.

13 JUSTICE SOTOMAYOR: That could include
14 federal or state law claims. Under your
15 reading, this reference to "except" is
16 definitional, p(f)(2).

17 MR. KATYAL: Justice Sotomayor, you're
18 right to say that under our reading the except
19 the jurisdiction that is ousted of the state
20 court is greater than what is precluded by
21 Congress. That was intentional. What I'm
22 trying to say is that's exactly what happened
23 in the '34 Act. And it's done so for good
24 reason, because as this Court said in
25 Chadbourne, when Congress is precluding

1 something, that's very strong medicine. That's
2 them saying to states you can't have this law
3 at all, the substantive law, but when we're
4 talking about jurisdiction over federal claims,
5 Congress is the master of that and can -- they
6 can decide, you know, where to bring a case and
7 so on.

8 Now, you had asked about the
9 legislative history and I want to get back to
10 that because -- and the purpose because I do
11 think it is very strong. The purpose is found
12 in our blue brief -- the statutory findings are
13 in our blue brief at page 20. I want to
14 isolate three of them. This is the text of the
15 statute.

16 JUSTICE KAGAN: Could we -- I'm sorry,
17 could we just talk about the text before we
18 speak about the purpose --

19 MR. KATYAL: Sure.

20 JUSTICE KAGAN: -- which -- because,
21 you know, "except as provided" in 77p, the
22 natural way to read that is we look at 77p, the
23 whole thing, and we see what's the "except"
24 that's provided in. We don't look to an
25 ancillary definitional provision that all it

1 does is define a term. We look for a rule that
2 might be in conflict, that could be taken to be
3 in conflict, with the jurisdictional provision.

4 MR. KATYAL: Right.

5 JUSTICE KAGAN: So, you know, it just
6 seems as though your interpretation does a very
7 odd thing textually when you read "except as
8 provided" in Section 77p to say let's look to a
9 definition in that section.

10 MR. KATYAL: So, Justice Kagan, you're
11 reading from Section 22(a), the "except"
12 clause, which is also the -- which is also
13 77b(a). It's found in our blue brief at page
14 8a. And you're absolutely right that the
15 clause says "except as provided" in Section 16.
16 And you'd say -- if that alone, which is the
17 part you read to me, were enough, you would
18 say, well, do you look to the definition? It's
19 unclear. But it's more than that because then
20 it says "with respect to covered class
21 actions." So there are two halves to this
22 "except" clause.

23 The first half is, you're right -- is
24 to say -- point you in the direction of where
25 to look, but it's the second part with respect

1 to covered class actions that I think our
2 reading gives effect to these words and theirs
3 does not. That is, it points you --

4 JUSTICE ALITO: Mr. Katyal, I had -- I
5 had a similar concern as Justice Kagan. Our
6 late colleague wrote a book called Reading Law,
7 which provides guidance about how you read
8 statutes. And I looked through that to see
9 what we are supposed to do when Congress writes
10 gibberish.

11 And that's what we have here. You
12 said it's obtuse. That's flattering. And we
13 have very smart lawyers here who have come up
14 with creative interpretations, but this is
15 gibberish. It's -- it is just gibberish.

16 It says -- the provision that was read
17 says that the state courts have jurisdiction
18 over federal claims, except as provided in
19 Section 77p, which says nothing whatsoever
20 about jurisdiction for state -- for federal
21 claims.

22 MR. KATYAL: So --

23 JUSTICE ALITO: So what are -- what
24 are we supposed to do with this?

25 MR. KATYAL: Justice Alito, I -- I

1 think I'd say three things about that. First,
2 as I -- as I was saying to Justice Ginsburg, I
3 don't think the statute's by any stretch a
4 model of clarity, but I don't go so far as to
5 say it is gibberish. Your late colleague in
6 that book did talk about how if you really
7 can't figure it out, then you look to, for
8 example, the statutory findings, that even as a
9 textualist as he was said, you know, look to
10 that to try and figure out what Congress was
11 getting at. And this returns me to Justice
12 Sotomayor's question and the blue brief at page
13 20, because the statutory findings really do
14 tell you, I think, what Congress is doing.

15 They're as follows: "Since enactment
16 of that Reform Act legislation, considerable
17 evidence has been presented to Congress that a
18 number of securities class action lawsuits have
19 shifted from federal to state courts."

20 And then "this shift has prevented
21 that Act from fully achieving its objectives,"
22 and then "it is appropriate to enact national
23 standards while preserving the appropriate
24 enforcement powers of state securities
25 regulators and not changing the current

1 treatment of individual lawsuits."

2 JUSTICE SOTOMAYOR: I'm sorry, that
3 says nothing about ousting the state courts.
4 It says providing national standards that will
5 control state enforcement agencies.

6 So whether it's state court or federal
7 court, it's still the same national standards.

8 MR. KATYAL: Well, it's not the same
9 national --

10 JUSTICE SOTOMAYOR: But -- but -- but
11 going --

12 MR. KATYAL: -- standards because
13 Congress cared very much about the procedures.
14 The whole Reform Act did things like say you
15 can't have professional plaintiffs, there are
16 limits on attorneys' fees, all sorts of stuff
17 --

18 JUSTICE SOTOMAYOR: What was very
19 clear in the Act is that there are certain
20 sections that were clearly intended to be
21 national, certain things that were and were not
22 covered, and then there were, you're right,
23 some procedural aspects, but nowhere in those
24 procedural aspects did Congress say they have
25 to be followed both in state and federal court.

1 MR. KATYAL: In the Reform Act, you're
2 absolutely right, but I do think that is the
3 way of understanding what SLUSA was doing.
4 It's precisely because they weren't followed,
5 Justice Sotomayor, in state court --

6 JUSTICE SOTOMAYOR: Can we -- can we
7 go back to your definition? A covered class
8 action under, I call it 77p, it's just easier
9 for me, has a bunch of different subsections.

10 MR. KATYAL: Yes.

11 JUSTICE SOTOMAYOR: You're relying on
12 the definitional one. But each of the
13 pertinent ones also talks about class action
14 limitations, removal of covered class actions
15 by referencing "p" in its entirety.

16 What is either illogical, contextually
17 wrong, or improper about looking at all of the
18 provisions of "p" that talk with respect to
19 covered class actions?

20 MR. KATYAL: I --

21 JUSTICE SOTOMAYOR: Because B and C
22 are certainly talking with respect to covered
23 class actions.

24 MR. KATYAL: So I certainly agree with
25 you, Justice Sotomayor, that when Congress used

1 the -- and pointed to the entire clause, it
2 could point to any part of the clause, you
3 know, and I think the definition does give you
4 the best indicia of it.

5 But there's nothing that says that you
6 should only look, as my friend on the other
7 side does, says, only look at the preclusion
8 provisions.

9 After all, these are about
10 preclusions.

11 JUSTICE SOTOMAYOR: No, he's not doing
12 that. He's saying you look at every provision
13 that mentions or talks about the covered class
14 action.

15 MR. KATYAL: And if you did, then
16 you'd look to the definition as well. And that
17 would say, as I was saying to Justice Kagan,
18 except as provided in Section 16, so you look
19 to Section 16, with respect to covered class
20 actions, and you look to what that is.

21 JUSTICE KAGAN: Well, if your reading
22 were right, Mr. Katyal, it would be written
23 something like: Except with respect to class
24 actions as defined in -- not as provided by --
25 as defined in 77p(f)(2), not just 77p.

1 So there are two ways in which your
2 reading really does seem at odds with the
3 statutory text. First by not saying the text
4 says provided in, you're saying defined by,
5 and, second, the -- the statute makes clear you
6 look to 77p as a whole, not to some
7 sub-subsection within it.

8 MR. KATYAL: So I don't think either
9 of those means that our reading is at odds,
10 Justice Kagan. I think all that suggests is
11 that, you know, as I was saying to Justice
12 Ginsburg, Congress had other ways of writing
13 the statute that are clear, that could have
14 been clearer, but this Court confronts this --
15 and this returns to Justice Alito's question --
16 all the time, in big cases like *Burwell*, in
17 small cases like *Perry versus Merit Systems*
18 *Protection Board* last term, you're dealing with
19 the statute that, maybe if you look at it one
20 way it's gibberish, maybe some of you could
21 have written it better, but it still has to be
22 given some meaning.

23 And our reading of --

24 JUSTICE GINSBURG: Under your reading
25 -- under your reading, Mr. Katyal, are there

1 any 1933 Act claims that could be brought,
2 federal claims, under the 1933 Act that could
3 be brought in state court?

4 MR. KATYAL: Absolutely, Justice
5 Ginsburg. And that's why, to return to your
6 first question, why Congress didn't say
7 exclusive jurisdiction as they did in the '34
8 Act.

9 Congress in SLUSA took care, and this
10 is Finding 5 that I had read to Justice
11 Sotomayor earlier, to say, look, we want to
12 preserve the vast majority of concurrent
13 jurisdiction in state courts. That's
14 individual lawsuits and class actions that
15 aren't covered. So that's derivative actions
16 or actions not seeking money damages or actions
17 for fewer than 50.

18 But if you accept their reading, what
19 you're essentially doing is saying, look,
20 Congress in this statute, they built this super
21 safe house, you know, in SLUSA with a front
22 door that was locked that had alarm systems to
23 bar against federal court abuse of federal
24 claims -- that's the Reform Act -- and then the
25 side doors they locked because they were

1 worried about state court abuse and federal
2 court abuse of state law claims -- that's
3 Justice Sotomayor's point -- but they didn't
4 even build the back of the house.

5 They didn't build even a door to deal
6 with the problem of all of this being repleaded
7 now in state courts. These are federal claims.

8 JUSTICE KAGAN: Well, but you're --
9 you're forgetting that most securities actions
10 are Exchange Act actions. They're not
11 Securities Act actions.

12 And for that, Congress did everything
13 it wanted because Exchange Act actions are all
14 in the federal courts. There is exclusive
15 jurisdiction there.

16 So essentially what was happening was
17 that in Exchange Act actions, it -- that
18 exclusive jurisdiction was being compromised by
19 the ability of people to bring state law
20 actions.

21 And Congress completely shut that
22 down. So Congress did everything it wanted
23 with respect to Exchange Act actions, which are
24 the lion's share of securities lawsuits.

25 MR. KATYAL: Justice Kagan, I don't

1 know about lion's share or not, but it is very
2 clear, manifestly clear, that SLUSA dealt with
3 both problems, '33 and '34. There are two
4 separate titles that deal with this.

5 And there is a good -- as the amici
6 here say, this is a huge problem on the ground.
7 You know, the Alibaba brief says that
8 50 percent now of these '33 Act claims
9 involving IPOs, which, you know, if it's an
10 IPO, it's usually a '33 Act claim, 50 percent
11 of them have parallel federal and state court
12 litigation.

13 JUSTICE BREYER: Now let me ask one
14 textual question and one purposeful question.

15 The textual question, think of V,
16 okay, and V talks about except as provided in
17 77p, et cetera, and covered, suits in equity
18 and actions at law, does that phrase
19 specifically refer to the '33 Act?

20 MR. KATYAL: Yes.

21 JUSTICE BREYER: It says the '33 Act?

22 MR. KATYAL: Yes, so it says -- it's
23 all actions at law, and the next words -- and,
24 again, I'm reading at Blue Brief page 8a.
25 We're reading 22a or 77v(a): Actions at law

1 brought to enforce any liability or duty
2 created by this subchapter. Created by this
3 subchapter.

4 JUSTICE BREYER: Well, does this
5 subchapter mean '34, '33, or is it ambiguous
6 between the two?

7 MR. KATYAL: It's not ambiguous,
8 Justice Breyer. It is modifying the '33 Act.
9 And that is crucial to our argument. The title
10 --

11 JUSTICE BREYER: Yeah, it is crucial,
12 okay.

13 MR. KATYAL: Yes. The title of --

14 JUSTICE BREYER: Yeah, yeah, yeah.
15 Your argument is stronger with that.

16 MR. KATYAL: Absolutely.

17 JUSTICE BREYER: I -- I -- I agree.

18 MR. KATYAL: The title of this act is
19 called -- this provision is called --

20 JUSTICE BREYER: Yeah.

21 MR. KATYAL: -- Jurisdiction of
22 Offenses in Suits. It is about federal claims.

23 JUSTICE BREYER: Okay, okay. I'll ask
24 my question to the other side. The -- the --
25 the -- the -- on the -- on the purpose, I -- I

1 assumed that you put the strongest legislative
2 history argument you could find on page 20 of
3 your brief -- and that's when President
4 Clinton, when he signed it and so forth and all
5 that stuff you have there -- and -- and it
6 seemed to me in reading through the legislative
7 history, I couldn't find anything that really
8 makes clear that it's referring to the '33 Act.

9 It could be just referring to the '34
10 Act, I think. Is there something you want to
11 point me to that -- that would absolutely make
12 clear that this is referring to the '33 Act?

13 MR. KATYAL: I think the conference
14 report does in its very first lines. And I
15 think it is talking about both the --

16 JUSTICE BREYER: Perspectives.

17 MR. KATYAL: -- '33 and '34 Act. And
18 there's no --

19 JUSTICE BREYER: It's -- it's
20 absolutely clear on -- it's pretty clear on
21 that?

22 MR. KATYAL: I do think it's clear. I
23 think that, you know, that -- I mean, and
24 Congress, again, this returns to my point to
25 Justice Kagan, Congress affirmatively --

1 JUSTICE BREYER: All right. Okay.
2 Okay. I'll go read that. I'll read it. I'll
3 read it.

4 MR. KATYAL: -- modified the '33 Act.

5 JUSTICE BREYER: Got it. I'll read
6 it.

7 MR. KATYAL: Assuming --

8 JUSTICE BREYER: My textual argument
9 question is this. My textual question is that
10 what I think your argument, but perhaps not the
11 government's argument, requires us to read C in
12 a pretty unnatural way, that's p(C), see,
13 because it says "as set forth in subsection B."

14 So what you want us to do is to look
15 at subsection B and take that as referring
16 to -- which is possible but it's tough -- not
17 having the words "based upon statutory or
18 common law of any state."

19 You see, because -- because if it --
20 if it picks that up, well, then -- then all
21 we're talking about is those actions that have
22 the state action within it are removable, which
23 explains the anomaly that you started out with
24 and it would just be an anomaly and you'd say,
25 well, it isn't a practical anomaly because no

1 sensible lawyer is going to include the state
2 one anymore. He'll just include the '33 one.

3 MR. KATYAL: Right. So, Justice
4 Breyer, I get --

5 JUSTICE BREYER: So how do I -- how do
6 I deal with that textual problem?

7 MR. KATYAL: Certainly, I think the
8 Solicitor General's way of dealing with that is
9 available to you, but I think that our argument
10 does not depend on, you know, on reading the
11 removal provision the way it does.

12 All our argument depends on -- it's a
13 straight-forward reading, and it -- you know, I
14 understand Justice Kagan --

15 JUSTICE BREYER: It says "a covered
16 security as set forth in subsection (b)." Now,
17 there are commas around the (b), around that
18 phrase I just read, I agree, but the most
19 natural thing is it's referring to those
20 covered actions that are referred to in (b).
21 And what it refers to in (b) are covered
22 actions all right, but -- but they're involving
23 state law.

24 MR. KATYAL: Right. So my only point
25 to you is the first -- our argument is really

1 about the first half, the jurisdiction clause.

2 JUSTICE BREYER: Yeah.

3 MR. KATYAL: And the jurisdiction
4 clause is all you need to look at. It says
5 that there's concurrent jurisdiction, that's
6 what the '33 Act said, except as provided in
7 Section 16 with respect to covered class
8 actions. And so, in order to decide does a
9 state court have jurisdiction, you look to
10 Section 16 and you look to the definition of a
11 covered class action.

12 Our argument is that is, you know,
13 it's not the -- you know, the usual way
14 "provided" is -- is written -- Justice Kagan's
15 right to say that -- but it's not such an
16 unusual way. There are other statutes that do
17 exactly this. You know, the National Guard
18 statute and the scholarship statute, vessels,
19 and the like, our example about -- you know,
20 about parking that's in our reply brief at page
21 5. These are ways of doing this.

22 And, again, I think that, you know, if
23 Congress was going to do what my friend on the
24 other side says --

25 JUSTICE BREYER: Uh-huh.

1 MR. KATYAL: -- which is to say that
2 by bringing a state law count in your federal
3 complaint, you now are ousted out of state
4 court, one would expect that --

5 JUSTICE BREYER: You --

6 JUSTICE SOTOMAYOR: All right. So why
7 not -- why not make the second "except" clause
8 read identically? But the Congress didn't.
9 Under your theory, assume somebody brings a
10 1933 Act claim, in state court, tied to a
11 non-1933 state law action.

12 Under your theory, what happens to
13 that case?

14 MR. KATYAL: Yep.

15 JUSTICE SOTOMAYOR: It can't get
16 removed because under (c) you can only remove
17 those claims that are -- state law claims, that
18 are based on 1933. And this says you can't
19 remove them. So now what happens?

20 MR. KATYAL: Right. So, Justice
21 Sotomayor, you're exactly right that, under our
22 reading, the preclusion is narrower than the
23 ousted jurisdiction in SLUSA so that there is a
24 category of cases, non-covered securities or
25 claims that aren't about fraud, in which there

1 is no preclusion, but we believe there is no
2 state court jurisdiction over these federal
3 claims.

4 JUSTICE SOTOMAYOR: So your theory is
5 that on those claims they just get ousted out
6 of court, even though they have a non-covered,
7 completely viable non-'33 state law action?

8 MR. KATYAL: Exactly. And that's
9 exactly the --

10 JUSTICE SOTOMAYOR: That's -- that's a
11 fairly extreme result on a reading that bucks
12 the presumption, and one that exists when
13 there's an ambiguity, that says we presume in
14 favor of concurrent jurisdiction.

15 So you're taking a very strong
16 presumption, turning it on its head, and saying
17 we're ousting state courts over jurisdiction of
18 securities actions that have nothing to do with
19 federal law.

20 MR. KATYAL: So -- so two things.

21 JUSTICE SOTOMAYOR: That's -- that's
22 what you're saying.

23 MR. KATYAL: Well, I don't think
24 that's exactly right. So two things. First is
25 --

1 JUSTICE SOTOMAYOR: Why is it not
2 exactly right?

3 MR. KATYAL: Because, first, I don't
4 think this is some anomalous reading. This is
5 reading the '33 Act exactly the way the '34
6 does. Now, you say --

7 JUSTICE SOTOMAYOR: No, this Act does
8 not preempt those state law non-1933,
9 non-federal actions.

10 MR. KATYAL: Justice Sotomayor, with
11 respect, it actually does. SLUSA has a removal
12 provision and a preclusion provision for the
13 1934 Act.

14 JUSTICE SOTOMAYOR: For those state
15 law claims that relate to federal claims --
16 that relate to federal claims. But it
17 explicitly exempts out those that don't.

18 MR. KATYAL: With respect to state
19 claims, it's precluding --

20 JUSTICE SOTOMAYOR: Exactly. State
21 claims.

22 MR. KATYAL: -- in the '34 Act, it's
23 precluding the same basket of state claims as
24 the '33 Act, and the jurisdiction, the way we
25 read it, is exactly the same. That is, that

1 same category of cases, non-covered securities,
2 non-fraud cases, there's no jurisdiction in
3 state courts for them, but they are -- but they
4 don't happen to be precluded under both the '33
5 and '34 Act.

6 JUSTICE SOTOMAYOR: Exactly.

7 MR. KATYAL: Now, you -- and now, you
8 had asked about the presumption about
9 concurrent jurisdiction. And I don't think
10 that presumption even applies here. Those
11 cases that my friend cites are cases --

12 JUSTICE SOTOMAYOR: So how about --

13 MR. KATYAL: -- in which the statute's
14 silent --

15 JUSTICE SOTOMAYOR: --
16 anti-commandeering cases? In what other
17 situation where we do not have a federal law
18 that preempts a state law, have we ever
19 permitted the federal government to tell the
20 states that they can't adjudicate a case under
21 their own law?

22 MR. KATYAL: Well, my friend on the
23 other side hasn't even made that argument, but
24 I do think preclusion --

25 JUSTICE SOTOMAYOR: I -- I --

1 MR. KATYAL: -- and preemption --

2 JUSTICE SOTOMAYOR: -- I think it's a
3 very natural argument. Under what --

4 MR. KATYAL: Preclusion and preemption
5 are pretty natural concepts in the law.

6 JUSTICE SOTOMAYOR: But it's not --
7 you just said to me the '33 and the '34 Act do
8 not preclude certain state law securities
9 actions. If they're not precluded, how can we
10 give a reading to this provision that would
11 stop the state courts from adjudicating
12 those cases?

13 MR. KATYAL: Justice Sotomayor, I'd
14 caution the Court into adopting a ruling that
15 would call into question the constitutionality
16 of not just the '33 Act --

17 JUSTICE SOTOMAYOR: No --

18 MR. KATYAL: -- but the '34 Act.

19 JUSTICE SOTOMAYOR: -- you can -- you
20 can pass a federal law that says this federal
21 law precludes these actions. But if you don't
22 have one that says that --

23 MR. KATYAL: But I think --

24 JUSTICE SOTOMAYOR: -- how can you
25 order the state court not to adjudicate a claim

1 that is not precluded --

2 MR. KATYAL: So the --

3 JUSTICE SOTOMAYOR: -- that is
4 expressly not concluded.

5 MR. KATYAL: The answer to this is
6 found in the Senate report brief -- Senate
7 report at page 4 in which they said we are very
8 concerned for federalism reasons about
9 preclusion because it's such strong medicine.
10 But when we're dealing with jurisdiction, we
11 have the ability to paint with a broader brush
12 without interfering with federalism principles.

13 Here, we're only talking about federal
14 court count -- federal court causes of action,
15 and all Congress is saying is that they are the
16 master of that and you can't bring those in
17 state court when it's subject to very different
18 standards than you can in federal court.

19 JUSTICE GINSBURG: Mr. -- Mr. Katyal,
20 you make this as a -- as a taking -- allowing a
21 state court to hear a federal claim that
22 shouldn't be there. But on your reading of
23 this statute, the cure is in your own hands,
24 because you agree with the government that you
25 could remove this case to federal court and

1 then you'd have your federal forum. But you
2 didn't do that. You didn't --

3 MR. KATYAL: So -- so you're about to
4 hear from the government about their -- their
5 theory. We do think it does solve a lot of the
6 policy concerns that Congress was getting at.

7 We think our textual reading is better
8 because we actually give effect to the 12 words
9 in the -- in the modification of federal court
10 jurisdiction. And so we think that's why you
11 should adopt our reading over the Solicitor
12 General's.

13 If I may reserve.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Kedem.

17 ORAL ARGUMENT OF ALLON KEDEM

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

19 IN SUPPORT OF AFFIRMANCE

20 MR. KEDEM: Mr. Chief Justice, and may
21 it please the Court:

22 Petitioners are correct that Congress
23 enacted SLUSA to reestablish federal courts as
24 the preferred venue for large class actions
25 involving nationally traded securities.

1 But it did so not by eliminating state
2 court jurisdiction over suits involving federal
3 claims but by permitting removal of such suits
4 from state to federal court.

5 Perhaps a good place to start, Justice
6 Breyer, would be with your question about the
7 removal provision and how, under the text of
8 that provision, removal of actions that only
9 involve federal claims is permitted. And I
10 think it's easiest to understand if you're
11 looking directly at it, 77p, subsection (c), on
12 page 1a of the red brief.

13 I think the question for the Court is
14 whether the limiting clause, as set forth in
15 subsection (b), modifies the phrase immediately
16 before it, "involving a covered security," or
17 instead modifies the phrase that comes at the
18 beginning of the sentence, "any covered class
19 action."

20 If it modifies "any covered class
21 action," Justice Breyer, I think you would be
22 correct that what Congress would mean by that
23 is the type of class action that's specified at
24 subsection (b), which would have all of the
25 criteria, including that it would be pleaded

1 under state law.

2 But if we're correct that instead it
3 modifies "involving a covered security," then I
4 think you would look to subsection (b) to
5 answer the question what type of connection to
6 a covered security did Congress have in mind
7 when it used that phrase?

8 JUSTICE BREYER: Well, why, if all
9 they wanted the parenthetical "as set forth in
10 subsection (b)" -- that's the words we're
11 talking about, right?

12 MR. KEDEM: That's correct.

13 JUSTICE BREYER: And it's in commas.

14 MR. KEDEM: That's correct.

15 JUSTICE BREYER: Why wouldn't they say
16 "as set forth" and then they'd refer to (2)(a),
17 the definition of covered class action?

18 MR. KEDEM: I think what we're talking
19 about is not just the definition of covered
20 class action. It's what Congress meant by the
21 phrase "involving a covered security," which is
22 a phrase that doesn't have its own definition.

23 JUSTICE BREYER: Ah.

24 MR. KEDEM: And to figure out what
25 that means, you look at (b)(1) and (b)(2),

1 which talk about certain types of misconduct in
2 connection with the purchase or sale of a
3 covered security. We think that's --

4 JUSTICE BREYER: True, but then --
5 then -- suppose, all right, involving a covered
6 class action. Now --

7 MR. KEDEM: But it's not involving a
8 covered class action.

9 JUSTICE BREYER: What --

10 MR. KEDEM: It's involving a covered
11 security.

12 JUSTICE BREYER: Involving a covered
13 security.

14 MR. KEDEM: And we think -- we think
15 for a few reasons it makes the most sense to
16 read the limiting clause as applying to that
17 phrase.

18 First of all, based on the rule of the
19 last --

20 JUSTICE KAGAN: So, Mr. Kedem, so now
21 I understand your argument, but it still
22 doesn't really fit with (b) 1 and 2. I mean,
23 if it were just involving a covered security,
24 as set forth in subsection (b), you would look
25 to something which told you what a covered

1 security is.

2 But (b) 1 and 2 don't do that. They
3 talk about, you know, the kind of conduct
4 that's illegal.

5 MR. KEDEM: That's right.

6 JUSTICE BREYER: Yeah.

7 MR. KEDEM: Because it's not just
8 modifying covered security. It's modifying the
9 phrase involving a covered security.

10 And you have to figure out what does
11 it mean to involve the security in the relevant
12 sense. Perhaps it would be useful to consider
13 an example of a hypothetical statute in which
14 Congress imposed liability for "impeding
15 interstate commerce as set forth in Section
16 100."

17 In that case, I think you would want
18 to look to Section 100 --

19 JUSTICE BREYER: Ah, I see. Okay.

20 MR. KEDEM: -- and the type of
21 impeding acts that are described there to tell
22 you what it means to impede in the relevant
23 sense.

24 JUSTICE BREYER: Okay. So your point
25 -- your point is involving a covered security?

1 MR. KEDEM: That's right.

2 JUSTICE BREYER: So you have to both
3 know what a covered security is, and you also
4 have to know is what kind of involvement.

5 MR. KEDEM: That's right. The first
6 part is very --

7 JUSTICE BREYER: And so for covered
8 security you could have just referred to three
9 related findings, but you have to know a second
10 thing, which is how is it involved?

11 MR. KEDEM: That's correct.

12 JUSTICE BREYER: And 1 and 2 in (b)
13 tell you how it is involved?

14 MR. KEDEM: That's right. We think
15 that's the better reading, first --

16 JUSTICE BREYER: Okay, I see.

17 MR. KEDEM: -- based on the rule of
18 the last antecedent --

19 JUSTICE BREYER: I see, I see, I see.

20 MR. KEDEM: -- under which the
21 limiting clause is most naturally applied to
22 the thing that comes immediately before it,
23 rather than to something that comes earlier in
24 the sentence.

25 JUSTICE BREYER: I see.

1 JUSTICE GINSBURG: Should we pass on
2 -- pass on that in a case where there was no
3 effort to remove? Removal isn't part of this
4 case.

5 MR. KEDEM: That's right. It's not
6 squarely presented, but we do think that it's
7 covered by the question presented in the
8 following sense: both Petitioners and
9 Respondents make structural arguments about the
10 relationship between the except clause and the
11 anti-removal provision in the penultimate
12 sentence of 77v, subsection (a). And this is
13 an explanation that responds to both of those
14 arguments.

15 Moreover, Petitioners make a very
16 powerful policy-based argument that Congress
17 could not have intended for federal claims to
18 be stuck in state court where they wouldn't
19 benefit from the protections of the Reform Act.
20 That was the whole point of SLUSA. This is
21 also a powerful response to that.

22 In addition, we do think that it would
23 be very useful --

24 JUSTICE GORSUCH: So you --

25 MR. KEDEM: -- that the lower court --

1 JUSTICE GORSUCH: -- you understand
2 the legislative history that Justice Breyer was
3 asking about is relevant to the '33 Act, not
4 just the '34 Act?

5 MR. KEDEM: That's -- that's right.
6 Congress was concerned about both acts.

7 In addition to the rule of the last
8 antecedent, I would point to the fact that in
9 between our two candidates for the limiting
10 clause, "any covered class action" at the
11 beginning of the sentence and "involving a
12 covered security" later on, there's an
13 intervening phrase, "brought in any state
14 court."

15 And that phrase doesn't have any
16 obvious analog in subsection B, which, as the
17 Court is well aware, applies regardless of
18 whether you're in federal or state court. And
19 we think that strengthens the inference that
20 the limiting clause should be applied to the
21 thing adjacent to it.

22 JUSTICE KAGAN: Could -- I just want
23 to get the -- the best version of your
24 argument.

25 MR. KEDEM: Sure.

1 JUSTICE KAGAN: 1 and 2 involve a
2 covered security because what?

3 MR. KEDEM: Because they involve
4 certain types of misconduct in connection with
5 the purchase and sale of a covered security.
6 In other words, what does it mean to involve a
7 covered security in a sense that's relevant for
8 the removal provision? It has to have an
9 omission with regard to that covered security,
10 a false statement with regard to that covered
11 security, and the like, the types of misconduct
12 specified in those two provisions.

13 JUSTICE SOTOMAYOR: Counsel, what do
14 you do with our statement in Kircher? And I
15 know you try to distinguish it.

16 MR. KEDEM: Sure.

17 JUSTICE SOTOMAYOR: But it very
18 explicitly says removal and jurisdiction to
19 deal with removed cases is limited to those
20 precluded in the terms of subsection (b).

21 MR. KEDEM: That's right.

22 JUSTICE SOTOMAYOR: And that was the
23 very argument that was raised there.

24 MR. KEDEM: Well, the Court said it
25 both ways in Kircher. It said it that way,

1 that the two provisions, the scope of them is
2 identical, but it also said that they were
3 identical in that they both require certain
4 types of misconduct.

5 JUSTICE SOTOMAYOR: Counsel, that's a
6 bit of a stretch. When I read the opinion,
7 every time it related to, itself to 1 or 2, it
8 would say something like, like 1 and 2, or 1
9 and others. It would not limit itself to just
10 1 and 2. It would just --

11 MR. KEDEM: I think it was talking
12 about the types of misconduct at issue in 1 and
13 2. And the reason I think that is because the
14 specific argument that the Court was
15 considering in Kircher was the argument that
16 the plaintiffs made that the case did not
17 belong in federal court because it didn't
18 involve the purchase or sale of a covered
19 security.

20 The defendants responded: Even if
21 true, that's an argument about preclusion under
22 subsection (b), not an argument about removal
23 under subsection (c).

24 JUSTICE ALITO: Do you really think
25 that whoever wrote this removal provision

1 thought about all this stuff that you're
2 telling us now?

3 MR. KEDEM: I'm not sure that they
4 thought about the rule of the last antecedent
5 and the like. But I do think that --

6 JUSTICE ALITO: If they set out to do
7 what you say this does, and they decided this
8 is the way we're going to do it, I think it's
9 so far from reality that it really strains
10 credulity.

11 MR. KEDEM: I think even if you think
12 that our reading is a little bit of a stretch,
13 I think the contrary reading is also a little
14 bit of a stretch. I think --

15 JUSTICE ALITO: I mean, all the
16 readings that everybody has given to all of
17 these provisions are a stretch.

18 (Laughter.)

19 JUSTICE ALITO: I'm serious. Is there
20 a certain point at which we say this means
21 nothing, we can't figure out what it means,
22 and, therefore, it has no effect, it means
23 nothing?

24 MR. KEDEM: Justice --

25 JUSTICE ALITO: Can we not -- we have

1 to say it means something?

2 MR. KEDEM: I would caution the Court
3 against saying it means absolutely nothing. I
4 do think that if the Court is concerned about
5 the policy arguments that Petitioners raise,
6 which we think are very important arguments,
7 and based on the findings of fact in SLUSA
8 these -- they are things that Congress was
9 concerned about, we think that our removal
10 argument gets to essentially the same place as
11 a policy matter but with a much more plausible
12 textual basis.

13 JUSTICE BREYER: Part of the problem,
14 I mean, I don't think -- I don't find this as
15 confusing as -- I mean, I might be wrong in how
16 I'm looking at it -- but as Justice Alito.

17 I'm thinking the drafter is given a
18 task and his task is to do two things,
19 economically, efficiently, I mean, that is
20 efficiently with words.

21 One thing he has to do is get rid of
22 these state actions. That's one. And the
23 second thing he has to do is to remove the
24 federal act cases into federal court. Okay?
25 And that's with the mixer, not mixture, so

1 forth.

2 MR. KEDEM: Right.

3 JUSTICE BREYER: If he was given that
4 task, this is the language that does it, but I
5 would expect there would be a report, and in
6 this report there would be an explanation such
7 as you gave me of the word "involving." And my
8 guess is there is no such report.

9 MR. KEDEM: That's correct.

10 JUSTICE BREYER: There's supposed to
11 be.

12 MR. KEDEM: There is no such
13 explanation, but there's also no contrary
14 explanation that we're aware of.

15 JUSTICE BREYER: Well, that's true.
16 That's true.

17 MR. KEDEM: If I could add two more
18 textual points --

19 JUSTICE BREYER: Yeah.

20 MR. KEDEM: -- that support our
21 reading of the statute.

22 If what is meant is the contrary
23 reading, any covered class action of the sort
24 that's specified in subsection (b), it's not
25 clear what the words "involving a covered

1 security" would be doing in that sentence.

2 At best, it would be superfluous and
3 at worst confusing and distracting.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
8 ON BEHALF OF THE RESPONDENTS

9 MR. GOLDSTEIN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 When the Petitioners' lawyer stands up
12 and says in the first minute that his reading
13 is obtuse and when the Solicitor General's
14 lawyer spends the entire time on an argument
15 that isn't in any of their briefs in the case,
16 you know that the lawyers are scrambling to try
17 and figure out what the statute means.

18 And the way we think you would resolve
19 that is to recognize that these words actually
20 mean something. They may target a null set.
21 They may not accomplish anything. But this
22 Court has said in cases like Manning that if
23 Congress is going to change this kind of law
24 significantly, you don't find elephants in
25 mouse holes.

1 You don't say that obtuse language
2 disrupts and takes away from the state courts,
3 a long-standing form of jurisdiction, and
4 that's what the other side wants to happen
5 here.

6 The Securities Act of 1933, unlike the
7 '34 Act, always has provided for state court
8 jurisdiction. That is the way it has always
9 been. And if Congress wanted to disrupt that
10 and get rid of that, it would say so quite
11 expressly.

12 JUSTICE KENNEDY: I -- I can see the
13 importance of deciding the removal issue here
14 because it's central to the interpretation of
15 the question -- the answer to the question
16 before us.

17 On the other hand, as Justice Ginsburg
18 pointed out, the case wasn't removed. Could a
19 clear opinion be written and reserve the
20 removal question?

21 MR. GOLDSTEIN: Well, Justice Kennedy,
22 I have learned that the answer to the question
23 can the Supreme Court do X is always yes.

24 (Laughter.)

25 MR. GOLDSTEIN: You -- you can write

1 an opinion that says we agree, for example,
2 with the government and the Respondents that
3 this language at the very least isn't clear
4 enough to accomplish this result. We reserve
5 for another day the removal question.

6 To be -- and that honestly as a matter
7 of jurisprudence is probably the right thing to
8 do. You're talking about two things. They
9 didn't remove it and it's not in the question
10 presented.

11 And if you want to signal to the
12 lawyers how it is that we're supposed to
13 litigate these cases, that's probably not the
14 -- the best signal to send.

15 On the other hand, it's true, for
16 example, that if the Court were to understand
17 the Kircher decision that we do and the
18 structure between (b) and (c) in 77p as having
19 a parallel in v(a), one could effectively
20 resolve the removal question, but you could
21 only, essentially, resolve it in the favor of
22 non-removal. I -- it would be very hard, I
23 think, to write an opinion honestly that says
24 what should happen here is these cases should
25 be removed under 77p(c).

1 JUSTICE GORSUCH: Mr. Goldstein,
2 speaking of gibberish --

3 MR. GOLDSTEIN: Yes?

4 JUSTICE GORSUCH: -- aren't we stuck
5 with gibberish your way too? I mean, it seems
6 like it's gibberish all the way down here
7 because -- because under your version, as I
8 understand it, v(a), that first "except"
9 clause, is superfluous. It doesn't -- doesn't
10 do anything. And also we render "involving a
11 covered security," that language, potentially
12 superfluous in (c).

13 MR. GOLDSTEIN: Okay. So --

14 JUSTICE GORSUCH: So help me out with
15 that.

16 MR. GOLDSTEIN: I -- I --

17 JUSTICE GORSUCH: And -- and I know --
18 I know we generally -- you know, we -- nobody
19 likes gibberish, but it is our job to try and
20 give effect whenever possible to Congress's
21 language. It's not for us to assume that
22 Congress's language means nothing --

23 MR. GOLDSTEIN: Sure.

24 JUSTICE GORSUCH: -- and was a waste
25 of time. It went through bicameralism and

1 presentment. And, normally, respect for the
2 legislative process dictates that we afford
3 some meaning to these words.

4 MR. GOLDSTEIN: Fair -- fair enough.
5 I will say, however, just to be clear, that you
6 do have a background presumption that Congress
7 would do something like this clearly and these
8 are conforming amendments. To be sure, if you
9 decided that my reading just came up with
10 nothing and his was perfectly sensible -- -

11 JUSTICE GORSUCH: But --

12 MR. GOLDSTEIN: -- we would have a
13 problem.

14 JUSTICE GORSUCH: -- doesn't yours --

15 MR. GOLDSTEIN: No.

16 JUSTICE GORSUCH: -- indeed come up
17 with nothing --

18 MR. GOLDSTEIN: No. It doesn't.

19 JUSTICE GORSUCH: -- with respect to
20 that first "except" clause and also with
21 respect to the "provided" -- "involving covered
22 securities" language? Why don't you help me
23 out with that.

24 MR. GOLDSTEIN: Okay. So the phrase
25 "except as provided in section X with respect

1 to subject matter Y" appears throughout the
2 U.S. Code a bunch of times.

3 JUSTICE GORSUCH: I'm talking about
4 this one.

5 MR. GOLDSTEIN: Oh, I promise --

6 JUSTICE GORSUCH: Let's get there.

7 MR. GOLDSTEIN: Okay. Mixed cases is
8 one example. Also the cases like those
9 described in your Merrill Lynch versus Manning
10 decision. So there are cases that involve
11 either a state law claim that isn't expressed
12 -- that -- that relies on the Securities Act,
13 the '33 Act, for the substantive standard or a
14 case that combines a '33 Act case with also a
15 state law case. And so --

16 JUSTICE GORSUCH: Help -- help me out.
17 How -- how --

18 MR. GOLDSTEIN: Okay. So what would
19 happen is that if Congress had not amended
20 v(a), what you would have had is, in 77p(b), a
21 prohibition on a complaint that combines a
22 state law --

23 JUSTICE GORSUCH: Right. It's a --
24 it's a straight prohibition, this Court has
25 said, in Kircher. It's not -- it has nothing

1 to do with jurisdiction.

2 MR. GOLDSTEIN: Well --

3 JUSTICE GORSUCH: It's a preclusion
4 provision.

5 MR. GOLDSTEIN: Okay. Fair enough.

6 JUSTICE GORSUCH: So -- so --

7 MR. GOLDSTEIN: It is -- it is much
8 closer to a jurisdiction --

9 JUSTICE GORSUCH: You don't need it.

10 MR. GOLDSTEIN: It is much closer to a
11 jurisdictional provision than the definition in
12 (f)(2). It says shall not be --

13 JUSTICE GORSUCH: Well, this Court --
14 this Court has said it's a preclusion
15 provision.

16 MR. GOLDSTEIN: Okay.

17 JUSTICE GORSUCH: So we're stuck with
18 that --

19 MR. GOLDSTEIN: Okay. But it is --

20 JUSTICE GORSUCH: -- right? Work with
21 -- just let me -- work with me, all right?

22 MR. GOLDSTEIN: Sure.

23 JUSTICE GORSUCH: You can't refer to
24 (c) because we have another "except" clause
25 that refers to (c). So it has to refer to (b),

1 but there's no point in referring to (b) if
2 Kircher is right and this is just a preclusion
3 provision.

4 MR. GOLDSTEIN: I would disagree. And
5 so, if you were to ask -- to Justice Breyer's
6 point, if you gave a drafter a mission, what
7 would they do? If I -- if this is the mission
8 and that is (b) -- under 77p(b), what we're
9 going to do is bar complaints, call it
10 preclusion, bar complaints that combine a state
11 law claim that involves a covered security and
12 is a covered class action with a -- some other
13 claim, so a '33 Act claim.

14 And if what you wanted to do is avoid
15 confusion about what you do with the concurrent
16 jurisdiction under v(a), because that same
17 complaint would both be precluded under p(b)
18 and within the concurrent jurisdiction of the
19 states under v(a), it makes perfect sense to
20 have a conforming amendment that says, okay,
21 the -- the concurrent jurisdiction doesn't
22 include the cases that we just barred in p(b).

23 JUSTICE GORSUCH: But that's stating
24 the blindingly obvious.

25 MR. GOLDSTEIN: Oh, well, you know, to

1 Mr. Katyal's point about closing the doors --

2 JUSTICE GORSUCH: That's superfluous.

3 MR. GOLDSTEIN: -- and windows and
4 everything -- it is not superfluous.

5 JUSTICE GORSUCH: It's closing a door
6 twice. It's not closing a window.

7 MR. GOLDSTEIN: It is not superfluous,
8 sir, because, remember, jurisdiction says the
9 courts don't have jurisdiction no matter if the
10 defendant invokes this matter -- this provision
11 or not. It is a categorical instruction to the
12 courts; whereas p(b) is something that --

13 JUSTICE GORSUCH: Okay. You haven't
14 helped me out much there. Maybe you can help
15 me with the -- the language in -- in (c),
16 "involving a covered security."

17 MR. GOLDSTEIN: Sure.

18 JUSTICE GORSUCH: How is that not
19 superfluous on your reading?

20 MR. GOLDSTEIN: It is only an
21 indication of where it is that you look in p --
22 in 77p, because there are a lot of provisions
23 that are in 77p. So, if you say look at 77p,
24 what happens to covered securities? If I just
25 -- if you just take the language in these terms

1 and you ask what does 77p provide with respect
2 to covered securities?

3 JUSTICE GORSUCH: I think we're
4 speaking past each other again, because I'm
5 referring to, I'm sorry, 77p(c) --

6 MR. GOLDSTEIN: Oh.

7 JUSTICE GORSUCH: -- all right? Which
8 says "any class -- covered class action brought
9 in a state court involving a covered security
10 as set forth in subsection (b)." The
11 government's position is that the words
12 "involving a covered security" must be doing
13 some work. And it seems to me --

14 MR. GOLDSTEIN: Oh, I -- I'm not sure
15 what you're reading from, sir. You're talking
16 about in v(a) --

17 JUSTICE GORSUCH: The removal
18 provision.

19 MR. GOLDSTEIN: Of v(a)?

20 JUSTICE GORSUCH: No.

21 MR. GOLDSTEIN: Okay. Of 77p(c)?

22 JUSTICE GORSUCH: P(c).

23 MR. GOLDSTEIN: Okay. Great.

24 JUSTICE GORSUCH: Okay? Still p(c).

25 MR. GOLDSTEIN: Yes. Right.

1 JUSTICE GORSUCH: All right? Any
2 covered class action brought in a state court
3 involving a covered security as set forth in
4 (b). The government makes the argument that
5 if, in fact, all you were doing was referring
6 to (b), including state law classes -- state
7 law causes of action, you wouldn't need
8 "involving a covered security."

9 MR. GOLDSTEIN: There's going to be --

10 JUSTICE GORSUCH: That language would
11 be superfluous.

12 MR. GOLDSTEIN: Well, there would be
13 superfluity on anybody's reading because
14 "brought in any state court" would also be
15 arguably superfluous; "any covered class
16 action" would be superfluous. If all you're
17 doing is saying pick up the cases in (b) --
18 what Kircher says and I do think it does --
19 Justice Sotomayor is right that it --

20 JUSTICE GORSUCH: No, no, because
21 we're talking about removal here. So you have
22 to identify cases that are in state court in
23 order to do any of that.

24 MR. GOLDSTEIN: Okay. Well, then any
25 covered class action. Okay?

1 JUSTICE GORSUCH: Any covered class
2 action could be one in federal court. So it
3 makes sense to put it --

4 MR. GOLDSTEIN: No, I'm just saying in
5 terms of it would be superfluous as -- as well.

6 JUSTICE GORSUCH: I don't see why, any
7 covered class action brought in state court may
8 be removed.

9 MR. GOLDSTEIN: Well, everything --

10 JUSTICE GORSUCH: That makes sense.

11 MR. GOLDSTEIN: Well, every -- (b),
12 everything that is in (b) is with respect to a
13 covered class action. To the point that this
14 statute is not drafted with incredible
15 precision, what Kircher says is going on in
16 SLUSA is in (b) we're going to ban a set of
17 cases, in (c) we're concerned that we might
18 have recalcitrant state courts; the cases that
19 are banned in (b) can be removed under (c).

20 And I don't even think this last
21 antecedent argument would help the other side
22 very much for two reasons. The first is the
23 last antecedent is "covered securities." It's
24 not "involving a covered security."

25 And the second is you have to ask,

1 Justice Kagan, when -- when they refer to
2 involving a covered security, it's not just
3 involving a covered security in the air; it is
4 an action involving a covered security. And
5 that action has to be one that's based on state
6 law.

7 JUSTICE KAGAN: I'll -- I'll add to
8 that. I mean, as I stare at it a little bit
9 more, I wish I had asked Mr. Kedem, "and shall
10 be subject to subsection (b)," because that
11 suggests that it has to be dismissed, and you
12 wouldn't want to dismiss the kind of cases that
13 Mr. Kedem wants to remove.

14 MR. GOLDSTEIN: His whole point is
15 that you wouldn't dismiss them, but that's Your
16 Honor's point.

17 JUSTICE KAGAN: Yeah, but that would
18 make "shall be subject to subsection (b)"
19 superfluous and -- and essentially mean
20 nothing.

21 MR. GOLDSTEIN: Right. So just to
22 circle back around to the question, and,
23 Justice Alito, you -- you have pointed out that
24 maybe this thing does nothing at all. That may
25 well be true. We do think it picks up the

1 mixed cases. The mixed cases did exist
2 previously, but --

3 JUSTICE ALITO: What sense does that
4 -- what sense does that make? The fed -- the
5 state courts have concurrent jurisdiction over
6 '33 Act claims, except if a lawyer is foolish
7 enough to include in the state court complaint
8 state claims that fall within the -- the
9 prohibition? What -- what sense does that
10 make?

11 MR. GOLDSTEIN: Well, Justice Alito,
12 it would make sure that there isn't confusion.
13 It would resolve an ambiguity.

14 It's not intended to do very much.
15 It's a conforming amendment. We don't think
16 that the statute -- this provision, which isn't
17 discussed anywhere in the legislative history
18 at all, is intended to accomplish very much.

19 All it's intending to do, we think,
20 and it obviously didn't do it, is --

21 JUSTICE GINSBURG: Which -- which
22 provision are we talking about?

23 MR. GOLDSTEIN: The v(a) amendment of
24 the jurisdictional provision.

25 JUSTICE GINSBURG: So you -- are you

1 answering the road to nowhere?

2 MR. GOLDSTEIN: Yes. I'm answering
3 the road to nowhere. We don't think that it is
4 a road to nowhere because it does make clear
5 that the courts, without regard to whether or
6 not the defendant invokes p(b), do not have
7 jurisdiction. It actually accomplishes that
8 result. But no matter --

9 JUSTICE GINSBURG: Is it just matching
10 the jurisdictional to the preclusion and
11 removal?

12 MR. GOLDSTEIN: All right. If you --
13 if you told someone to write a statute that
14 says modify v(a) to make sure there isn't
15 jurisdiction over the cases we just banned, you
16 would use this exact language.

17 And the one thing I do want to be
18 clear on is that this phrase -- we do start
19 just with the simple text, that phrase, "except
20 as provided in section X with respect to
21 subject matter Y," everywhere in the U.S. Code
22 it's used refers to the -- the person to a
23 rule. It's the opposite of a "notwithstanding"
24 clause.

25 It always has some measure of

1 superfluity -- superfluity. What it's doing is
2 just -- you've got two different provisions and
3 it tells you which one controls. A
4 "notwithstanding" provision --

5 JUSTICE GINSBURG: Mr. Goldstein, why
6 would -- why would Congress want to do that,
7 given that if the federal claim is in federal
8 court, there are, as Mr. Katyal pointed out,
9 all these restrictions on counsel and who's the
10 represented party? You have the same -- the
11 federal claim in state court, and none of those
12 restrictions apply.

13 MR. GOLDSTEIN: That's the usual rule,
14 Justice Ginsburg. And, remember, we have a
15 really good indication that's what Congress
16 intended, because that's the PSLRA. Congress,
17 when it wrote the PSLRA against the backdrop of
18 state law -- state court '33 Act class actions,
19 wrote it to say that the procedural protections
20 apply in cases that are -- are subject to the
21 Federal Rules of Civil Procedure.

22 What it decided to do is it matched
23 the same compromise that's in the '33 Act
24 itself, which is it allowed these cases to be
25 decided in state court. And as we explained,

1 state courts have their own discovery stays.
2 They have it in their rules.

3 JUSTICE BREYER: There, I -- I see
4 that. But look, I have one textual question on
5 your side.

6 MR. GOLDSTEIN: Sure.

7 JUSTICE BREYER: My textual question,
8 which we're discussing now, is we go to v.

9 MR. GOLDSTEIN: Yeah.

10 JUSTICE BREYER: And let's look at the
11 second part, which says "except as provided" in
12 p(c) --

13 MR. GOLDSTEIN: Yeah.

14 JUSTICE BREYER: -- you can't remove
15 it.

16 MR. GOLDSTEIN: Yes.

17 JUSTICE BREYER: So that means if it's
18 provided -- "except" is provided in p(c).

19 MR. GOLDSTEIN: Yep.

20 JUSTICE BREYER: And it's talking
21 about the '33 Act.

22 MR. GOLDSTEIN: Yes.

23 JUSTICE BREYER: All right. So now
24 let's go over to -- to C. And since they're
25 talking about removal of a '33 Act case --

1 MR. GOLDSTEIN: A case with a '33 Act
2 claim.

3 JUSTICE BREYER: With a '33 Act claim.

4 MR. GOLDSTEIN: Yes.

5 JUSTICE BREYER: A case with a '33 Act
6 claim, we look to C and say C, therefore, must
7 refer in part to cases with '33 Act claims.

8 MR. GOLDSTEIN: Yes.

9 JUSTICE BREYER: And if that's so,
10 since -- involving a covered security --

11 MR. GOLDSTEIN: So, it would be a
12 mistake --

13 JUSTICE BREYER: -- if it refers to --
14 if it refers to all of (v), including the state
15 law problem, there is virtually no scope.

16 MR. GOLDSTEIN: No, that's not true.
17 It's the mistake.

18 JUSTICE BREYER: Ah, you're going to
19 -- I get it. I get it. You're going to say --

20 MR. GOLDSTEIN: Here's what I think
21 happened.

22 JUSTICE BREYER: All right. Is this
23 the answer?

24 MR. GOLDSTEIN: Yeah. So SLUSA is a
25 door-closing statute.

1 JUSTICE BREYER: Yeah.

2 MR. GOLDSTEIN: It looks back to the
3 PSLRA, and says we've got a statute that's been
4 evaded a bunch. We just don't want it to
5 happen again. So we're going to ban a set of
6 cases that have shifted from federal to state
7 court. Those are '34 Act cases by and large.
8 We're going to ban those. What might a clever
9 plaintiff's lawyer do?

10 Well, what they might do is slap a '33
11 Act claim on here and say it's still within the
12 concurrent jurisdiction of the state courts.
13 So we're just going to make clear that's not
14 true. That's all --

15 JUSTICE BREYER: Okay.

16 MR. GOLDSTEIN: -- that this provision
17 does.

18 JUSTICE BREYER: Now, this is my
19 choice then. All right. The choice is reading
20 V for '33 Act, back to C, and when they talk
21 about C, which refers to (b), they either mean
22 all of (b), which is a case with a state law
23 claim in it --

24 MR. GOLDSTEIN: Yes.

25 JUSTICE BREYER: -- and also a '33 Act

1 claim.

2 MR. GOLDSTEIN: Yes.

3 JUSTICE BREYER: That's your view.

4 MR. GOLDSTEIN: Yes.

5 JUSTICE BREYER: Or the government's
6 view is that involving just refers to 1 and 2
7 in (b) and so it refers to '33 Act claims
8 sitting there by themselves in state court,
9 too.

10 MR. GOLDSTEIN: Right.

11 JUSTICE BREYER: That's my choice,
12 right?

13 MR. GOLDSTEIN: Yes.

14 JUSTICE BREYER: And I've got to see
15 which of those two makes more sense in terms of
16 the Act, which is why I started out with I want
17 to know what they want to do --

18 MR. GOLDSTEIN: Sure.

19 JUSTICE BREYER: -- with '33 Acts --

20 MR. GOLDSTEIN: Sure.

21 JUSTICE BREYER: -- because a '33 Act
22 is a big deal here.

23 MR. GOLDSTEIN: Right.

24 JUSTICE BREYER: Then the -- the SG's
25 position looks better.

1 MR. GOLDSTEIN: Sure.

2 JUSTICE BREYER: And if it's a not
3 much of a deal, a throwaway --

4 MR. GOLDSTEIN: Right.

5 JUSTICE BREYER: -- then yours looks
6 better.

7 MR. GOLDSTEIN: Right. And so --

8 JUSTICE BREYER: Is that right?

9 MR. GOLDSTEIN: Yes. So here is why
10 you know that the '33 Act is the tail and the
11 '34 Act is the dog. The legislative history
12 and the findings that my friend talks about
13 refer to the shift of cases from federal to
14 state court. These are not cases that shifted.
15 '34 Act case shifted.

16 The '34 Act requires you to file in
17 federal court. What happened is people instead
18 brought securities fraud cases under state law
19 in state court to avoid the PSLRA. Fine. But
20 that's not what happened here.

21 Our case was under the Securities Act
22 -- the '33 Act. It was fine in state court
23 before the PSLRA. Congress didn't change that
24 in the PSLRA. It's not an evasion of any
25 existing standard. All the rules that applied

1 to the '33 Act continue to apply to it.

2 So what Congress was concerned about
3 is a body of cases moving out of federal court
4 to state court. These cases have been within
5 the concurrent jurisdiction, non-removable, of
6 the state courts since the day the statute was
7 enacted. That's the compromise.

8 JUSTICE ALITO: If a plaintiff files a
9 third -- files a claim in state court under a
10 state law cause of action that mirrors the '33
11 Act in the -- in the respects that are set out
12 in the statute, the state court can't entertain
13 that, am I right?

14 MR. GOLDSTEIN: That is correct.

15 JUSTICE ALITO: Okay. Now given that,
16 why in the world would Congress want the state
17 court to be able to entertain the real thing,
18 an actual '33 Act?

19 MR. GOLDSTEIN: Because what Congress
20 is targeting is it just doesn't want this
21 resolved under state law. It wants it resolved
22 under the '33 Act. It does want these
23 nationally-traded securities cases to be
24 litigated under federal law.

25 JUSTICE ALITO: I thought what it

1 wanted was it to be resolved under federal
2 procedural law?

3 MR. GOLDSTEIN: No, that is not
4 uniformly true. Remember, we're talking about
5 a concern of the evasion of the PSLRA. And
6 Congress quite --

7 JUSTICE ALITO: Yeah, they wanted to
8 -- they wanted to resolve in accordance with
9 the PSLRA.

10 MR. GOLDSTEIN: Right. And the PSLRA
11 --

12 JUSTICE ALITO: Which wouldn't apply
13 in state court.

14 MR. GOLDSTEIN: Exactly right. And so
15 that's our point and, that is, this is not an
16 evasion of the PSLRA. If Congress wanted to
17 delete the phrase in the PSLRA in cases that
18 are subject to the Federal Rules of Civil
19 Procedure and extend the PSLRA to the state
20 court, or if it wanted to make all these cases
21 removable or if it wanted to refer to a
22 definition, there are 10 different easier ways
23 and more clear ways, rather than to pick up a
24 phrase that is not used in this way in the U.S.
25 Code anywhere at all.

1 I did want to just respond to an
2 anomaly, it's akin to the one that you just
3 described as possible, that my friend talks
4 about. He says this: Look, under the
5 Respondents' view, if what you did was combine
6 a '33 Act claim with a state law claim, then we
7 admit that case would be litigated in federal
8 court. That is not correct.

9 Under 1441, this is what would happen,
10 is that the case would be removed to federal
11 court and under 1441(c) would mandate severing
12 out the prohibited state law claim and the case
13 would be remanded to state court and it would
14 be litigated in state court as a matter of law.

15 JUSTICE ALITO: The whole mixed case
16 thing doesn't make the first bit of sense to
17 me, that you've got the federal -- you have the
18 '33 Act claim and you have the prohibited state
19 act claim in state court.

20 So then the state court knows -- has
21 no jurisdiction whatsoever. What's going to
22 happen? The defendant moves to dismiss. The
23 plaintiff says, okay, fine, I dismiss my -- my
24 -- my state act claim.

25 MR. GOLDSTEIN: Right.

1 JUSTICE ALITO: Or the judge is going
2 to say, oh, it's too late. You combined them
3 to start out. The whole thing is dismissed.
4 And then, if the statute of limitations hasn't
5 run, the plaintiff can just come back and file
6 the federal -- the '33 Act claim in state court
7 by itself. Right?

8 MR. GOLDSTEIN: Yes, but that's only
9 because of SLUSA because what SLUSA is doing is
10 barring the state law claim. That wouldn't be
11 true if SLUSA didn't exist.

12 And I just think that you just have to
13 -- look, this is a narrow provision, not
14 discussed in the legislative history. You
15 can't ask it to do the world, which is to undo
16 the jurisdiction of the '33 Act that has
17 existed a long time and, that is, it's another
18 anti-evasion principle.

19 I do want to respond as well to my
20 friend's statement that -- he says the exact
21 opposite thing. He says his position produces
22 a direct parallel between the '33 and '34 Act,
23 and then to Justice Ginsburg says it treats the
24 '33 and '34 Act wildly differently.

25 It does treat them quite differently,

1 and that is his pointing to statements in the
2 legislative history that suggest that some
3 members of Congress believe that all securities
4 cases would be litigated in federal court. But
5 he leaves behind all of the non-class actions
6 and he picks up cases that SLUSA clearly was
7 not intended to apply to, and that is
8 non-covered securities.

9 SLUSA is quite clear about this, that
10 it is intended to respond only with respect to
11 the nationally-traded securities that are
12 defined as covered securities. But this
13 reading somehow picks up, according to the
14 Petitioners, all of the covered class actions,
15 even if it's not a nationally-traded security
16 at all.

17 And it would be incredibly weird to
18 write a statute that says, except as provided
19 in 77p with respect to covered securities, and
20 to do something radically different from what
21 77p does with respect to covered securities.

22 What it does is it causes them to be
23 dismissed, not removed, and it applies only
24 with respect to those that involve
25 nationally-traded securities. And their

1 reading doesn't.

2 It is really, really obtuse. It is an
3 extraordinarily unusual way to accomplish this
4 result, which is a big result. Mr. Katyal
5 believes the statute does something quite
6 important. It changes how the '33 Act
7 functions with respect to a large body of
8 cases.

9 And you just don't -- your
10 jurisprudence helpfully tells the Congress, if
11 you want to do something like that, do it the
12 simple way. Say as defined in or say it's
13 removable or say it's within the exclusive
14 jurisdiction.

15 If you find out that -- if you
16 believe, Justice Gorsuch and Justice Alito,
17 that this -- our reading would produce -- would
18 apply to a null set, which we disagree with,
19 nonetheless, it is the case that we do give
20 meaning to the phrase, it wouldn't pick up any
21 cases, but their reading is not -- the words
22 that Congress used aren't nearly clear enough
23 to accomplish that result.

24 If there are no further questions.

25 JUSTICE SOTOMAYOR: I have one. What

1 do you think -- what would be the null set if
2 you read the government's reading of the
3 removal -- the involving -- if you read it --

4 MR. GOLDSTEIN: Its reading -- its
5 reading today in argument?

6 JUSTICE SOTOMAYOR: Its reading today.

7 MR. GOLDSTEIN: Okay.

8 JUSTICE SOTOMAYOR: I assume you
9 understand it.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE SOTOMAYOR: All right. If we
12 read it the government's way --

13 MR. GOLDSTEIN: Yeah.

14 JUSTICE SOTOMAYOR: -- what would we
15 make -- what would be left of the second except
16 clause in -- in 77v(a)?

17 MR. GOLDSTEIN: The removal except
18 clause?

19 JUSTICE SOTOMAYOR: Yes.

20 MR. GOLDSTEIN: So --

21 JUSTICE SOTOMAYOR: Second except
22 clause.

23 MR. GOLDSTEIN: So the second except
24 clause, just to walk this through, says
25 basically whatever we're doing in 77p(c)

1 controls.

2 JUSTICE SOTOMAYOR: Right.

3 MR. GOLDSTEIN: Okay? And I do think
4 it's very useful that, except as provided and
5 should be read the same way in 77v(a), so it
6 does, you tell you to look somewhere else.

7 JUSTICE SOTOMAYOR: If you read this
8 the way the government does --

9 MR. GOLDSTEIN: Right. Yeah.

10 JUSTICE SOTOMAYOR: -- it says you
11 can't remove these cases in (a) --

12 MR. GOLDSTEIN: Yeah.

13 JUSTICE SOTOMAYOR: -- right, so you
14 can't remove them, but (c) says you can remove
15 them. So is there anything then that is not
16 removable? Why write the second except clause
17 at all?

18 MR. GOLDSTEIN: Well, it is the case
19 that it would be completely unnecessary because
20 (c) controls. I do think that probably in the
21 -- a point in the government's favor that
22 ultimately is in our favor is that there are
23 parts of V that don't do anything. Okay? And
24 the -- the removal provision is an example of
25 that.

1 If you didn't have the amendment to
2 the removal provision, you would still know
3 that you could remove under p(c). They're just
4 closing doors, locking them, crossing T's and
5 dotting I's a couple of times. That's how this
6 provision works.

7 Don't ask it to do more than it was
8 intended. Thank you.

9 JUSTICE KAGAN: Could I ask you, Mr.
10 -- Mr. Goldstein, also on this (c) provision,
11 and -- and this really ought to be a question
12 for Mr. Kedem, but he sat down. But I don't
13 want you to agree with me just for the sake of
14 --

15 MR. GOLDSTEIN: Okay.

16 JUSTICE KAGAN: -- agreeing with me.
17 But if I understand what he said, it's these
18 class actions with this last antecedent
19 principle, you're only referring to (1) and
20 (2), so now you -- you make those class actions
21 removable. But the way this provision works --
22 and you think kind of that makes sense, right?
23 We would want those -- those actions to be
24 removable, consistent with Congress's other
25 purposes --

1 MR. GOLDSTEIN: No, but --

2 JUSTICE KAGAN: -- but, I'm sorry?

3 MR. GOLDSTEIN: I don't think that,
4 but you might.

5 JUSTICE KAGAN: Okay. I'm saying
6 what --

7 MR. GOLDSTEIN: Hypothetical.

8 JUSTICE KAGAN: -- in his view, right?

9 MR. GOLDSTEIN: Okay.

10 JUSTICE KAGAN: And it says "and shall
11 be subject to subsection (b)." And all
12 subsection (b) does, the way this (c) provision
13 works is it makes a category of cases removable
14 only so that a court can dismiss them. That's
15 the point of subsection (c). It's like they
16 were worried that state courts wouldn't just
17 dismiss these actions so it made them removable
18 to be dismissed.

19 But then you're getting those cases up
20 there. You say, okay, we'll get them removable
21 because these cases really ought to be in
22 federal court, but under (c), now they have to
23 be dismissed.

24 MR. GOLDSTEIN: That's right. I will
25 say -- I -- I'll give thank you answer that I

1 think he might, and that is what he would say
2 is, okay, subject it to subsection (b) and some
3 of them get dismissed, and the rest of them
4 aren't subject to it. That's just not the
5 structure of this statute. And that's not what
6 Kircher says. Kircher says that this is a
7 anti-recalcitrant -- recalcitrance -- whatever
8 -- provision.

9 (Laughter).

10 MR. GOLDSTEIN: That the state courts
11 just aren't obeying the statute. There isn't
12 any indication that it was intended to pick up
13 a set of cases and deposit them in federal
14 court to litigate --

15 JUSTICE BREYER: There has to be.
16 There has to be, because the mixed case ends up
17 in part being in federal court.

18 MR. GOLDSTEIN: It does not because
19 under 1441(c) it, gets remanded. The federal
20 part of the case, as a matter of law, gets
21 cleaved off and gets sent back to state court.
22 It does not stay and get litigated in federal
23 court.

24 JUSTICE SOTOMAYOR: I'm sorry --

25 MR. GOLDSTEIN: Mr. Katyal was just

1 wrong about that.

2 JUSTICE SOTOMAYOR: -- what provision
3 are you citing?

4 MR. GOLDSTEIN: 14 -- 28 U.S.C.
5 1441(c), it's the removal provision. So what
6 happens is if you have a mixed case, the
7 combined federal and state cases that are
8 subject to p(b), it gets removed. And federal
9 law, 1441(c), says if you have a otherwise
10 non-removable provision combined -- claim
11 combined with a removable claim, that what you
12 do is you break them in half and you send the
13 non-removable case back -- claim back. And so
14 this --

15 JUSTICE BREYER: No, so that's major.

16 MR. GOLDSTEIN: Yes.

17 JUSTICE BREYER: I mean, either on the
18 one hand, your view, this is designed just to
19 get rid of the state actions.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE BREYER: On their view, it is
22 designed to do two things. One is to remove
23 the fed part to the Feds, and also to get rid
24 of the state.

25 MR. GOLDSTEIN: Right. And so if you

1 just --

2 JUSTICE BREYER: Is there any history?

3 MR. GOLDSTEIN: Not -- not about the
4 amendment to v, there's no history, and we
5 don't think there's any history that suggests
6 moving the cases to federal court.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Four minutes, Mr. Katyal.

11 REBUTTAL ARGUMENT OF NEAL K. KATYAL
12 ON BEHALF OF THE PETITIONERS

13 MR. KATYAL: Thank you.

14 Four points. First, Congress took the
15 affirmative step of modifying the preexisting
16 concurrent jurisdiction provision in Section
17 22. We're the only ones who give that some
18 meaning.

19 Justice Gorsuch, this is not about
20 surplusage, the canon of surplusage. This is
21 obliteration. They can't give you an
22 explanation for what Congress did when it added
23 those 12 words.

24 And that's why my friend says, oh,
25 there's some canon against doing -- a canon

1 that you have to do things a simple way. There
2 is no such canon in this Court's jurisprudence.
3 The closest, as Justice Sotomayor said, is the
4 presumption about concurrent jurisdiction, but
5 that presumption has never been held to apply
6 when a statute isn't silent. Those are only
7 when the Congress is silent. This is one in
8 which Congress has affirmatively taken the step
9 to remove 12 words -- to -- to remove some
10 subset of what was preexisting jurisdiction in
11 the state courts.

12 And, in addition, as this Court in
13 Kircher said, when you don't have a long
14 history of state court adjudication in the area
15 presumptions about preemption don't apply --
16 indeed, presumptions about preemptions, Justice
17 Breyer, your opinion in Geier says they don't
18 apply when you have an express statute that
19 deals with preemption.

20 And I think the same analogy is true
21 here. You have a specific statute that deals
22 with -- you know, which deals with the amount
23 of jurisdiction. So, I don't think this Court
24 could apply the presumption about concurrent
25 jurisdiction.

1 Second, Justice Breyer, you asked
2 about the legislative history. And, Justice
3 Alito, you asked who do you think -- do -- do
4 you think the person who wrote this statute set
5 out to do what you think you're saying it did?

6 And we're the only ones who are
7 telling you a story that is in the legislative
8 history itself. The first line of the
9 conference report: "Title 1 of SLUSA makes
10 federal court the exclusive venue for most
11 securities class action lawsuits." The manager
12 in the Senate, Senator D'Amato, and the chair:
13 "There shall be a uniform standard and there
14 should be a uniform procedure, and that's why
15 you move these nationally traded securities to
16 a federal forum." President Clinton's signing
17 statement: "Since the uniform standards
18 provided by this legislation state that class
19 actions generally can only be brought in
20 federal court, will be governed by federal law,
21 clarity on the federal law to be applied is
22 particularly important."

23 There is nothing in there saying this
24 is only about the '34 Act. This is my friend
25 on the other side's invention. Congress

1 affirmatively took the step to modify the '33
2 Act jurisdictional provision, not just the '34
3 Act.

4 Justice Kennedy, this is my third
5 point, you asked about removal and whether or
6 not if you didn't accept our view of 22(a),
7 would that mean that, you know, we'd
8 effectively be out of luck. And I think you
9 shouldn't reserve that question because of the
10 reasons that my colleague from the Solicitor
11 General's Office said, and indeed it may take
12 years for another case to come up precisely
13 because there's a bar on interlocutory appeals
14 from removal decisions, as this Court in
15 Kircher made clear.

16 And, in addition, the Ninth Circuit in
17 a case called Reya versus Michael Stores in
18 2014 said, when this Court, the Supreme Court,
19 makes removal available for the first time,
20 then we as litigants can go and seek that
21 removal. There's a lot of precedent which
22 barred us from seeking removal before, but,
23 obviously, we would do that if this Court were
24 to accept the alternative reading.

25 And last and finally, ultimately you

1 are left with Justice Alito's question: What
2 sense does their statutory reading make? Why
3 would bringing a state court count oust a
4 plaintiff out of state court when a mixed one
5 would not?

6 And Justice Ginsburg asked why would
7 Congress, when they're so concerned about
8 procedure and things like abusive litigation
9 and serial plaintiffs and massive attorneys'
10 fees, and took all these steps to regulate that
11 in the federal court context, why would they
12 just leave the back door gaping and wide open?
13 That is not the way to read a statute.

14 I understand the statute is a hard one
15 to read, but we're the only ones giving it a
16 reading that, A, makes sense; and that is, B,
17 consistent with the legislative history; and,
18 C, most importantly, is textual. We give
19 effect to those 12 words. They obliterate
20 them.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:10 a.m., the case
25 was submitted.)

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