No. 15-1439

IN THE

# Supreme Court of the United States

CYAN, INC., *et al.*,

*Petitioners,*

*v.*

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT**

# BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL VENTURE CAPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA works to represent its members' interests locally and globally. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA also has an office in London and its associated organization, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Many of SIFMA's members serve as underwriters for, or otherwise participate in, securities offerings and, as such, they have a vital interest in the issues raised by this petition. SIFMA regularly files *amicus* briefs in cases with broad implications for financial markets, and frequently has appeared as *amicus curiae* in this Court. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* 135 S. Ct. 1318 (2015), *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013),

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1. Pursuant to this Court's Rule 37.3(a), all parties consent to the filing of this *amici curiae* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

*Gabelli v. SEC*, 133 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses, trade associations, and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as those involving federal securities laws, including *Omnicare, Amgen, Gabelli, Halliburton, Matrixx Initiatives, and Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), among many others. Many of the Chamber's members are companies subject to federal securities laws that are directly and adversely affected by the California court's decision below.

The National Venture Capital Association ("NVCA") is the venture capital community's flagship trade association, serves as the definitive resource for venture capital data, and unites its member firms through a full range of professional services. NVCA's mission is to foster a greater understanding of the importance of venture capital to the U.S. economy, advocate for policies that strengthen the entrepreneurial ecosystem, and support innovation. Venture capitalists are committed to funding America's most cutting-edge entrepreneurs, working closely with them to transform breakthrough ideas into emerging growth companies that put innovation in the hands of the public and drive U.S. job creation and economic growth. Often, venture capitalists invest in start-up companies with the hope that, if the start-up is successful, they will be able to take the company public and earn a return on their investment. This common investment strategy, and consequently NVCA's members, would be directly and adversely affected if the Court were to uphold the California decision below because increased state court litigation of federal securities class actions has a potentially chilling effect on the willingness of the companies in which they invest to go public.

The issues raised by this case are of vital importance to *amici* given the increase in state court securities class action lawsuits since the decision in *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011) ("*Countrywide*"), and the adverse impact of increased state court litigation of class actions under the Securities Act of 1933 on the competitiveness of the U.S. capital markets.

## INTRODUCTION

Almost twenty years after the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") was enacted, *Countrywide* and the decisions that have followed it in California state and federal courts have facilitated a cottage industry of Section 11 federal securities class action lawsuits in California state courts. And, through the use of non-appealable orders to remand federal class action complaints, the lower California federal courts have effectively turned California state courts into a safe haven for vexatious federal securities class action lawsuits. This shift in federal securities litigation from federal to state courts is exactly what Congress sought to prevent when it enacted SLUSA and provided for exclusive federal jurisdiction for such actions.

In the five years since the California Court of Appeal's decision in *Countrywide*, fifty class action lawsuits alleging claims under the Securities Act of 1933 ("'33 Act") have been filed in California state court. Thirty-five of these cases have been filed in either San Mateo or Santa Clara county state court, in the heart of California's Silicon Valley, and all of these cases have named underwriters as defendants. This exponential growth in litigation and the fear of being haled into state court in California to defend protracted and expensive class action lawsuits threaten to hinder technology start-ups and entrepreneurs in accessing the nation's financial markets to raise the capital they need to launch and grow their businesses. The necessary corollary of this explosive growth of costly and unpredictable state court litigation is to curtail the competitiveness of U.S. markets and force capital-raising overseas.

As Petitioner explains, Congress in SLUSA foreclosed the abusive litigation practices allowed by *Countrywide*, in defiance of SLUSA, and this Court should now confirm that '33 Act class actions are subject to exclusive federal jurisdiction. *Amici* wish to underscore two arguments that support this conclusion.

*First*, restoring the correct reading of SLUSA furthers the strong federal interests in exclusive jurisdiction over '33 Act class actions. As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006). The proliferation of '33 Act class actions in state courts, if left unchecked, will have severe negative consequences for the nation's capital markets. Decisions like *Countrywide* and the rulings below sow uncertainty among issuers and underwriters concerning how the law that governs their conduct will be construed and applied. Increased uncertainty increases the risk to issuers and underwriters of raising capital in the United States, and this increased risk is ultimately passed on to investors in myriad ways. Among other things, enhanced litigation risk artificially depresses capital raising and entrepreneurship, and causes businesses to be wary of going public in the United States, thereby diminishing the strength and reputation of U.S. capital markets. Ultimately, investors pay for the costs of litigation through a lower return on their investments.

*Second*, only exclusive jurisdiction comports with SLUSA's plain language and purpose. The decision below—like the decision in *Countrywide*—incorrectly reads SLUSA's jurisdictional amendment in a way that renders it superfluous, which is contrary to well-established canons of statutory construction. The decision below also conflicts with Congress's acknowledged intent behind SLUSA—to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13 (1998).

## ARGUMENT

### I. EXCLUSIVE FEDERAL JURISDICTION OVER '33 ACT CLASS ACTIONS IS VITAL TO PROTECTING IMPORTANT FEDERAL INTERESTS IN THE PROPER FUNCTIONING OF THE U.S. SECURITIES MARKETS.

In a statute that has been law for nearly twenty years, Congress mandated exclusive federal jurisdiction for federal securities class action litigation, including '33 Act class actions. In 1995, Congress passed the Private Securities Litigation Reform Act (the "Reform Act") to "put an end to vexatious litigation that was draining value from the shareholders and employees of public companies." H.R. Rep. No. 105-640, at 9 (1998). When Congress found that "plaintiffs' lawyers [were] circumvent[ing] the Act's provisions by … filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available," H.R. Conf. Rep. No. 105-803, at 14-15 (1998), Congress enacted SLUSA in 1998. SLUSA was expressly designed to stem the "shift[] from Federal to State courts" that had resulted from the efforts of plaintiffs' attorneys to evade the Reform Act. Pub. L. No. 105-353, § 2(2), 112 Stat. 3227, 3227, *see also* H.R. Rep. No. 105-640, at 8-9 ("The purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

Notwithstanding SLUSA's mandate of exclusive federal jurisdiction, in 2011 the California Court of Appeals held in *Countrywide* that concurrent state-court jurisdiction over class actions under the '33 Act survived SLUSA. 195 Cal. App. 4th at 798 (holding that "concurrent jurisdiction" of '33 Act class actions "survived the amendments to the 1933 Act" as implemented by SLUSA). The California Superior Court's decision here followed *Countrywide* in denying petitioners' motion for judgment on the pleadings for lack of subject matter jurisdiction, explaining that the court's "hands are tied by" *Countrywide*. *See* App'x to Cert. Pet. at 1a, 5a-6a (reprinting unreported decision and transcript of argument below). The decision below is one of many California state and federal court decisions that have followed the faulty analysis of *Countrywide*, exponentially increasing California state-court litigation of '33 Act class actions as a result. In the five years since *Countrywide*, fifty class action lawsuits alleging claims under the '33 Act have been filed in California state court. Thirty-five of these cases have been filed in either San Mateo or Santa Clara county state court, in the heart of California's Silicon Valley, and all of these cases have named underwriters as defendants. By contrast, in the twelve years after SLUSA but before *Countrywide*, only six class actions under the '33 Act were filed in California state courts.

The California decisions ignoring SLUSA have thwarted the will of Congress that exclusive federal jurisdiction over '33 Act claims is essential to safeguarding the strong federal interest, embodied in SLUSA, in maintaining uniformity and integrity in the interpretation and application of the federal securities laws. As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

That is particularly true here. The U.S. securities industry employs over 900,000 people, with that number expected to grow 12% by 2018. *See* SelectUSA, *Financial Services Spotlight*, https://www.selectusa.gov/financial-services-industry-united-states. It raised $2.3 trillion of corporate capital for U.S. businesses in 2015, of which $2.14 trillion came from public debt and equity underwriting—the kind that often attracts '33 Act class actions. *See* SIFMA, *2016 Fact Book*, http://www.sifma.org/factbook/.[2] And, as a percentage of GDP, it contributes more than the entire U.S. agriculture, forestry, fishing, and hunting industry and nearly as much as the entire utilities industry. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *Industry Data*, http://www.bea.gov/iTable/index_industry_gdpIndy.cfm. These figures underscore the important national interest in protecting the securities industry from the uncertainty created by state court concurrent jurisdiction over '33 Act class actions.

Concurrent jurisdiction over '33 Act claims is not sufficient to safeguard these important federal interests. Market participants face significant uncertainty from not knowing which jurisdiction, state or federal, has authority to create precedent for and govern market conduct in accordance with the '33 Act. This uncertainty directly affects those market participants that are frequently named as defendants in '33 Act cases, especially issuers and underwriters, and drives up the cost of raising capital in the United States.

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2. Interestingly, in a year where '33 Act class actions continued to *increase* in state court, the amount of capital raised by the securities industry *decreased* by 1.1% from the prior year. *Id.*

"One of the most dominant criticisms of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and US' Global Financial Services Leadership* 29 (Jan. 22, 2007). Corporate executives have specifically cited the lack of predictability that arises from the overlapping roles of state and federal courts as a "major reason" why corporations increasingly choose to do business outside the United States. *Id.* at 77; *see also* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); *Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations* 30 (2007) ("[I]nternal observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing U.S. markets."). As Congress has recognized, the risk of vexatious litigation dampens the ability to raise capital, especially for new and innovative businesses and technologies, and artificially limits access to U.S. capital markets. *See* H.R. Rep. No. 104-50, at 19-20.

These concerns are not merely theoretical. Although around 32% of class action securities complaints are dismissed in federal court, only 6% (three out of fifty) of the '33 Act class action complaints filed in California state court since *Countrywide* have been involuntarily dismissed.[3] And even companies outside of California

3. Priya Cherian Huskins et al., *Guest Post: IPO Companies, Section 11 Suits, and California State Court*, The D&O Diary (Apr. 28, 2016), http://www.dandodiary.com/2016/04/articles/securities-litigation/guest-post-ipo-companies-section-11-suits-and-california-state-court/.

are being targeted in such suits: "For example, Alibaba (a China-based company) and King Digital (an Irish Company) both have Section 11 suits pending in California state courts." *Id.* The lower rate of dismissal in California state court makes these cases significantly more costly to litigate and settle.

Discovery—the main driver of litigation expense in securities class actions—occurs more easily and readily in '33 Act cases filed in state courts. In contrast to federal courts, it is not necessarily the case that the Reform Act's automatic stay of discovery, limitations on recovery of attorney's fees and expenses, and criteria governing selection of lead plaintiffs and their counsel apply in state court. *Compare* 15 U.S.C. § 77z-1 (setting forth federal court protections created by the Reform Act), *with Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1070 (1999) ("Under California law, nothing comparable to the provisions of the Reform Act—intended both to make abusive securities strike litigation more difficult to mount and sustain, and to further the declared congressional policy of a national securities market—would apply to class action securities fraud suits filed in our courts."). Likewise, heightened federal pleading standards separate and apart from the Reform Act may not apply in state court. *See Omnicare*, 135 S. Ct. at 1332 (holding that federal pleading standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), applies to '33 Act claims brought in federal court and that meeting it "is no small task for an investor"). Congress passed SLUSA to prevent plaintiffs from "circumvent[ing] the [Reform Act's] provisions by ... filing frivolous and speculative lawsuits in State court, where essentially none of the [statute's] procedural or substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998). Knowing all this, class action plaintiffs' attorneys continue to corral cases into state court, in direct contravention of SLUSA and other reforms.

Moreover, concurrent jurisdiction fosters wasteful, duplicative litigation. Only in federal court can multiple and overlapping securities actions be consolidated before a single judge for coordinated handling, thereby preventing duplicative discovery and inconsistent rulings on legal and factual issues. Under the rule dictated by *Countrywide* and the decision below, however, nothing stops plaintiffs from prosecuting parallel class actions in state and federal court. Indeed, *Countrywide* has even created situations where litigation in state and federal courts over the same facts and same claims yields vastly different results: the claims are dismissed in federal court, whereas those same claims are sustained and allowed to proceed to costly discovery and potential trial or settlement in state court. For example, in '33 Act class action litigation filed in federal and state court challenging Sunrun Inc.'s initial public offering, a federal district court dismissed the complaint with prejudice, whereas a California state court overruled defendants' demurrer and allowed the case to proceed to discovery, even though both the federal and state cases involved the same claims and parties and arose from the same transaction. *Compare Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764 (N.D. Cal. 2017) (Breyer, J.) (dismissing complaint), *with In re Sunrun Inc. S'holder Litig.*, No. 538215, Order dated Jan. 17, 2017 (overruling demurrer and setting a discovery conference). Companies, their directors, and securities industry participants are forced to defend sprawling federal securities litigation in state court—under one set of pleading, discovery, and class administration rules—and in federal court—under another. Issuers and underwriters, in turn, are forced to pass this extra expense on to the marketplace. Permitting competing state court litigation increases the costs of entry to the U.S. capital markets for issuers and forces investors to bear higher costs to compensate for soaring expenses.

In sum, concurrent jurisdiction over '33 Act class actions and the many problems it creates undermine the proper functioning of U.S. capital markets. If concurrent jurisdiction over '33 Act claims is permitted to continue, the severe negative consequences on the nation's capital markets discussed above will only worsen. The strong federal interests in safeguarding the integrity of the U.S. capital markets support reversal here.

## II. THE DECISION BELOW CONFLICTS WITH THE LANGUAGE AND INTENT OF SLUSA.

The decision below—like the decision in *Countrywide*—ignores the canon of statutory construction requiring that "legislative enactments should not be construed to render their provisions mere surplusage." *Dunn v. CFTC*, 519 U.S. 465, 472 (1997); *see also Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that "one of the most basic interpretative canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotations and citations omitted)).

SLUSA's jurisdictional amendment provides that state courts have concurrent jurisdiction over actions alleging '33 Act claims "except as provided in [Section 16] with respect to covered class actions." 15 U.S.C. § 77v(a). The California lower court decisions read the jurisdictional amendment's insertion of "except as provided in [Section 16] of this title with respect to covered class actions" to mean that only state law claims precluded by Section 16(b) and removable under Section 16(c) are no longer subject to state court concurrent jurisdiction. But this interpretation renders the jurisdictional amendment superfluous because Section 16(b) and Section 16(c) already have that effect. Construing the provision as the lower courts did ignores the language of the jurisdictional amendment, which provides that, "with respect to covered class actions," jurisdiction over '33 Act claims should not be concurrent.

Reading the statute to eliminate concurrent state court jurisdiction over '33 Act claims is consistent not only with rules of statutory construction, but also with Congress's purpose as reflected in SLUSA itself. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Congress enacted SLUSA after evidence emerged that the procedural protections of the Reform Act were causing plaintiffs to flock to state courts to pursue class action claims. While the Reform Act "sought to prevent abuses in private securities fraud lawsuits," "since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts." SLUSA, Pub. L. 105-353, 112 Stat. 3227, § 2(1)-(2). Further legislation was required to allow the Reform Act to "fully achiev[e] its objectives." *Id.* § 2(3). Accordingly, SLUSA was enacted to make "Federal court the exclusive venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13, under both the '33 and '34 Acts. Allowing securities class actions alleging exclusively federal securities claims to proceed in state court is an incongruous result that turns SLUSA on its head. There can be no rationale for such a result, and Congress certainly did not intend it.[4]

4. Although *amici* believe that exclusive federal jurisdiction best serves the language and intent of SLUSA, at a minimum the Court should ensure that adequate access to a federal forum for '33 Act class actions exists by adopting the United States' position that removal of such actions is permissible under 15 U.S.C. § 77p(c).

## CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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September 2017