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 Petition For Writ Of Certiorari
To The Court Of Appeal 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 THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

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), *Gabelli v. SEC*, 133 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v.*

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties have received timely notice of the intent to file this brief. 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.

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. In a recent study by Will

Gornall of the University of British Columbia and Ilya Strebulaev of Stanford University, the authors note that Apple, Google and Microsoft, three of the five largest U.S. public companies by market capitalization, all received most of their early, external funding from venture capital investors. Using public companies to measure the economic impact of venture-backed companies, the authors conclude that of the 1,339 companies that have gone public since 1974, 42% (556) can trace their roots to venture capital. Collectively, those 556 companies employ over three million workers and account for 85% of all research and development spending by companies that have gone public since 1974 and 63% of total market cap. NVCA's members make venture investments across all industry sectors and at various points in companies' life cycles. They have spawned new industries and led to pioneering and life-changing innovation in biotechnology, health care, software, semiconductors, telecommunications, computer science, and communications systems and devices—innovations that have enabled this nation to be the world's economic leader. Often, private venture capitalists invest in start-up companies with the expectation 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 petition 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 '33 Act class actions on the competitiveness of the U.S. capital markets.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Almost twenty years after the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") was enacted, *Countrywide* and the decisions that have followed it have allowed class action plaintiffs' attorneys to shift federal securities class action lawsuits to California state courts *en masse*. And, through the use of non-appealable orders to remand federal class action complaints, the lower California federal courts have effectively turned that state into a safe haven for vexatious federal securities class action lawsuits. Left unchecked, the shift in federal securities litigation from federal to state courts could become a nationwide trend. This shift is exactly what Congress sought to prevent when it enacted SLUSA.

In the five years since the California Supreme Court's decision in *Countrywide*, thirty-eight class action lawsuits alleging claims under the Securities Act of 1933 ("'33 Act") have been filed in California state court. Twenty-six 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, threatens to hinder technology start-ups and entrepreneurs in accessing the nation's capital markets in order to raise the cash they need to launch and grow their businesses.

The ’33 Act imposes liability on issuers and underwriters (and certain individuals and companies who control them) for false and misleading statements in securities offering materials. Although the ’33 Act has enhanced the integrity of the U.S. financial markets in certain respects, it also has created opportunities for abuse by class action plaintiffs’ lawyers who bring costly strike suits seeking a quick settlement. Congress has sought to curb such abuse by enacting reforms, such as the Private Securities Litigation Reform Act (the “Reform Act”), that, among other things, limit where ’33 Act class action lawsuits can be brought and who can bring them.

In particular, SLUSA sought, among other things, to eliminate state court concurrent jurisdiction over covered class actions alleging ’33 Act claims. Notwithstanding SLUSA’s clear statutory direction, California state courts have held that they still have concurrent jurisdiction over ’33 Act claims. As a result, California state courts have become a magnet for ’33 Act class actions, and some lower federal courts have followed California’s lead.

If left unchecked, the proliferation of ’33 Act class actions in state courts 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.

Opportunities for meaningful federal judicial review of this important federal question are limited. Federal appellate courts have been unable to review lower court decisions because orders granting remand are non-reviewable under 28 U.S.C. § 1447(d) and orders denying remand are reviewable only after final judgment or approval of interlocutory appeal under 28 U.S.C. § 1292(b), both of which are rare occurrences.

This Court has a rare opportunity now to resolve this uncertainty. This case squarely presents the question of whether state courts possess jurisdiction over '33 Act covered class actions, or instead whether federal courts have exclusive jurisdiction over such actions. That question is purely legal, fully dispositive, and ripe for review by this Court. There is no telling if and when another vehicle for review will come before this Court. The Court should grant certiorari to decide this important federal question now.

Certiorari is also warranted because the decision below conflicts 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). This Court should grant certiorari to reverse the decision below and give proper effect to SLUSA's language and intended purpose.

ARGUMENT

I. THE DECISION BELOW IMPINGES ON IMPORTANT FEDERAL INTERESTS IN THE PROPER FUNCTIONING OF THE U.S. SECURITIES MARKETS.

When the California Court of Appeals decided *Countrywide* five years ago, commentators predicted that it would transform the California court system into a haven for federal securities class action plaintiffs. *See* Kevin M. Lacroix, *So, There's Concurrent State Court Jurisdiction for '33 Act Suits, Right? Well…*, THE D&O DIARY (May 20, 2011), http://www.dandodiary.com/2011/05/articles/securities-litigation/so-theres-concurrent-state-court-jurisdiction-for-33-act-suits-right-well. These predictions have come to pass. In the five years since *Countrywide*, 38 class actions under the '33 Act have been filed in California state courts, almost all of which have named underwriters as defendants. By contrast, in the 12 years after SLUSA but before *Countrywide*, only six class actions under the '33 Act were filed in California state courts.

This trend shows no sign of slowing. Commentators have noted that the recent spike in '33 Act cases in California state courts is because "plaintiffs appear to be aware of and specifically taking advantage of the *Countrywide* decision." *See* Douglas Flaum, Edward Han & Rachana Fischer, *Why Section 11 Class Actions Are Proliferating in Calif.*, LAW360 (Apr. 27, 2015), http://www.law360.com/articles/647708/why-section-11-class-actions-are-proliferating-in-calif. Without the Court's intervention, this trend may well emerge in state courts outside of California.

Permitting class action plaintiffs' lawyers to target California and other states as safe havens for vexatious federal securities litigation undermines 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 $2.2 trillion of corporate capital for U.S. businesses in 2014, of which $2.1 trillion came from public debt and equity underwriting—the kind that often attracts '33 Act class actions. *See* SIFMA, *2015 Fact Book*, http://www.sifma.org/factbook/. And, as a percentage of GDP, it contributes more than the entire U.S. agriculture, forestry, fishing, and hunting 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.

If left unchecked, the effect of *Countrywide* will exact a heavy toll on the U.S. capital markets. *Countrywide* already has caused uncertainty among market participants regarding 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. "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, 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/, only around 5% (two out of thirty-eight) of the '33 Act class action complaints filed in California state court since *Countrywide* have been involuntarily dismissed. And even companies outside of

California 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.*

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, it is not clear that heightened federal pleading standards 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 [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, *Countywide* 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. 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. Underwriters, in turn, are forced to pass this extra expense on to the marketplace. Permitting competing state court litigation makes access to the U.S. capital markets more expensive as investors bear higher costs to compensate for soaring expenses.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT ISSUE NOW.

This is exactly the sort of nationwide securities class action lawsuit for which Congress, through SLUSA, has established exclusive jurisdiction in the federal courts. This action arises from an IPO that was registered with the U.S. Securities and Exchange Commission and traded on the New York Stock Exchange. All claims are based solely on federal law; the Complaint alleges no claims based on state law. This case therefore squarely presents the question whether state courts possess jurisdiction over ’33 Act covered class actions, or instead whether federal courts have exclusive jurisdiction over such actions. The issue on appeal is a pure question of law and is the dispositive issue in the case.

No better vehicle for resolving the issue is likely to materialize. Although the Court typically prefers to let issues percolate through the federal courts of appeals, see *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting), that is unlikely to happen here. Indeed, the question presented here has never been addressed by a federal circuit court, despite dozens of federal district court decisions that have addressed this question in the 18 years since SLUSA's enactment. That is because a district court's decision to grant a motion to remand on account of the concurrent jurisdiction issue "is not reviewable on appeal or otherwise" under 28 U.S.C. § 1447(d). As this Court has held, with the exception of the limited categories of cases specifically carved out in the text of § 1447(d),[2] that statute's prohibition on review of remand orders is absolute and "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640-42 (2006); *see also Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 237 (2007) (refusing to create a judicial exception allowing appellate review of district court orders under the Foreign Sovereign Immunities Act). On the flip side of the coin, a district court's decision to deny a motion to remand would be reviewable only after final judgment or upon approval of interlocutory appeal under 28 U.S.C. § 1292(b). But due to the enormous costs of litigating and potentially losing a securities class action lawsuit, such cases rarely proceed to a final judgment. *See* Cornerstone Research, *Securities Class Action Filings—2014 Year in Review* 12 (2015), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2014-Year-in-Review.pdf (showing

[2] *See* § 1447(d) (permitting appellate review of remand orders in cases removed pursuant to 28 U.S.C. § 1442, which deals with cases involving federal officers and agents, and 28 U.S.C. § 1443, which deals with civil rights cases).

that the vast majority of securities class actions end in dismissal or settlement, with only a few proceeding to verdict). And interlocutory appeal under § 1292(b) is typically reserved for "exceptional" cases. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

The absence of federal appellate review has created a vacuum that expands with each unreviewed lower court decision. Where a given '33 Act class action will be adjudicated, and under what standards, is increasingly unpredictable, with the result being driven by "the district in which the case happens to be heard, or even the judge within the district that the parties happen to draw." Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Class Actions, But the Frequent Failure to Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. PENN. J. BUS. L. 739, 743 (2015). If left to stand, the decision below will only strengthen the view that it is too costly and unpredictable to do business in the United States, driving away companies wishing to list their securities on U.S. exchanges. Simply put, unless and until this Court provides the necessary guidance, courts and litigants will continue to face even more confusion and disarray over the appropriate forum for class actions asserting only '33 Act claims.

III. THE DECISION BELOW CONFLICTS WITH THE LANGUAGE AND INTENT OF SLUSA.

Certiorari is also warranted because the decision below—and the decision in *Countrywide*—rest on fundamental errors of federal law. The California lower court decisions are contrary to 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.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the judgment below.

Respectfully submitted,

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