2021 WL 2385546 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

PIVOTAL SOFTWARE, INC., et al., Petitioners,
v.
SUPERIOR COURT OF CALIFORNIA, City and County of San Francisco, et al.

No. 20-1541.
June, 2021.

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

**Reply Brief for Petitioners**

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## *I CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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## *1 REPLY BRIEF

Plaintiffs' response confirms the need for review. Plaintiffs cannot dispute that state courts are divided over the question presented. Nor can they dispute that the court here read *"any* private action arising under" the Securities Act to mean *"some* private actions arising under" that Act-defying Congress's intent to eliminate the exorbitant discovery expense and undue settlement pressure created by even meritless securities claims. And while Plaintiffs attempt to downplay the question's significance, their own eleventh-hour efforts to moot the petition prove otherwise. Plaintiffs and their counsel would not abandon the discovery opportunity (and settlement leverage) they fought tooth and nail to obtain unless this Court's decision would have far-reaching significance. This controversy is justiciable, and the petition should be granted.

## I. THE QUESTION IS IMPORTANT AND HAS DIVIDED STATE COURTS NATIONWIDE

This Court granted certiorari in *Cyan* to resolve an important federal securities-law question dividing trial courts nationwide. *Cyan, Inc. v. Beaver Cnty. Emples. Ret. Fund,* 138 S. Ct. 1061, 1068-69 & n.1 (2018). It should do so again here.

1. Although Plaintiffs attempt to downplay the split, at least a dozen decisions refuse to apply the Reform Act's discovery stay in state court, while another seven apply it. Pet. 12-14. These decisions "only scratch the surface of the split" because courts often decide this question in unpublished rulings. Chamber/SIFMA Br. 6. If (as Plaintiffs assert) attempts to appeal have been scarce, that is largely ***2** because the issue's time-limited nature severely impedes appellate review. *E.g.,* So-Ordered Stipulation Withdrawing Appeal, *In re Dentsply Sirona, Inc. S'holders Litig.,* No. 2019-3399 (N.Y. App. Div., 1st Dep't May 15, 2020) (withdrawing appeal of discovery-stay after trial court dismissed underlying case); Pet. 15-16.

Nor is the entrenched divide "woefully undertheorized." Opp. 15. The issue has percolated for over two decades, and the arguments have been fully aired. That includes Plaintiffs' meritless Tenth Amendment argument. *E.g.,* Pls.' Opp. to Defs.' Mots. to Enforce the Automatic Stay at 13-14, *City of Livonia Retiree Health and Disability Benefits Plan v. Pitney Bowes Inc.,* No. X08-FST-CV-18-6038160-S (Conn. Super. Ct. Jan. 11, 2019) (advancing argument). This Court need not wait for a lower court to accept a constitutional argument that (as discussed *infra* pp. 6-7) is foreclosed by two centuries of precedent and practice.

2. Plaintiffs' attacks on the importance of the question presented are equally wrong. Plaintiffs insist that "[o]nly a few dozen state court cases are filed under the 1933 Act each year." Opp. 16. That same rationale was unsuccessfully argued in *Cyan. Cyan* Cert. Opp. 14. And Plaintiffs ignore these cases' sheer size. For securities class actions filed in 2020, the median maximum dollar loss (based on the change in a defendant's market capitalization) exceeded a billion dollars per case. Cornerstone Research, *Securities Class Action Filings: 2020 Year in Review* 38 (Appendix 1) (2021). Reflecting the economic consequences at stake, this petition and the Chamber of Commerce and Securities Industry and Financial Markets Association amicus brief urging review ***3** (at 15-17) were filed three weeks after the California Supreme Court's ruling.

Plaintiffs' other arguments contradict Congress's judgment. Plaintiffs contend, for example, that the question here has less significance than the one in *Cyan.* Opp. 18. But discovery-driven settlement pressure motivated Congress to enact the Reform Act. Pet. 18-19.

Similarly, Plaintiffs insist review is unwarranted because state courts "regularly" grant discretionary stays. Opp. 17. Plaintiffs are wrong: "state courts generally allow discovery to begin before they rule on a motion to dismiss." Michael Klausner et al., *State Section 11 Litigation in the Post-Cyan Environment (Despite* Sciabacucchi), 75 Bus. LAW. 1769, 1773 (2020). Indeed, Plaintiffs defeated Petitioners' discretionary-stay request. Regardless, Congress necessarily found these existing protections insufficient, enacting an *automatic* discovery stay with only narrow exceptions (which Plaintiffs never contend they satisfy). 15 U.S.C. § 77z-1(b)(1). Federal courts possess the same inherent authority, yet no one disputes the mandatory stay applies there. Plaintiffs may think the automatic stay unnecessary, but Congress reached a different conclusion.

Nothing in the Delaware Supreme Court's decision in *Salzberg v. Sciabacucchi* renders resolution of the split unnecessary. *Contra* Opp. 16. *Sciabacucchi* upheld the facial validity, in Delaware courts, of corporate charter provisions requiring Securities Act claims to be filed in federal court. 227 A.3d 102, 109 (Del. 2020). But corporations should not have to design their charters around state courts' refusal to enforce a federal statutory mandate, and some ***4** cannot. Mark J. Loewenstein, *Pushing the Envelope:* Salzberg v. Sciabacucchi *and Delaware's Evolving View of the Internal Affairs Doctrine,* 48 SEC. REGUL. L. J. 182, 188 (2020). Even for corporations that adopt such provisions, there is no assurance courts outside Delaware (*e.g.,* in California and New York) will enforce them. Klausner, *supra,* at 1770. The Delaware Supreme Court itself left open the possibility that federal-forum provisions may be invalid in certain contexts. *Sciabacucchi,* 227 A.3d at 135. And even if state courts uniformly enforced such provisions in suits against issuers, those provisions may not protect others-such as investment banks underwriting securities offerings, which are among Petitioners here. Loewenstein, *supra,* at 188.

## II. THE STATE COURT'S DECISION IS WRONG

The state courts refusing to enforce the Reform Act's discovery stay have defied the provision's plain language, which applies to "any private action arising under" the Securities Act. 15 U.S.C. § 77z-1(b)(1); *see* Pet. 16-19. Plaintiffs devote pages to defending this disregard for the statutory text. But disagreement about the merits is no reason to leave an important split unresolved. Plaintiffs are also wrong.

1. Tellingly, Plaintiffs lead their discussion not with the statutory text, but with a constitutional-avoidance argument. Opp. 19-21. Upon finally reaching the text, Plaintiffs' central contention is that the "question is what 'courts,' not what 'actions,' must impose a stay," and thus Section 77z-1(b)(l)'s "unelaborated reference[]" to " 'the court' " should be understood as referring to *federal* courts. Opp. 21, 24. ***5** But Section 77z-1(b)(1) is automatic: it mandates that discovery "shall be stayed" in the actions to which it applies-"any" private Securities Act "action." 15 U.S.C. § 77z-1(b)(1). The provision refers to the "court" only in authorizing courts in such actions to *lift* this automatic stay "upon the motion of any party." *Ibid.* And this "court" reference is far from "unelaborated": the provision makes clear at the outset that the "court" in question is the one presiding "[i]n any private action arising under" the Securities Act. *Ibid.* Because a state-court Securities Act suit is a "private action arising under" the Securities Act, a state court presiding over such an action may, on a proper showing, lift the automatic stay Section 77z-1(b)(1) otherwise imposes. *Ibid.* Plaintiffs can inject no ambiguity into this plain language.

Nor can Plaintiffs manufacture uncertainty from surrounding provisions. Far from demonstrating Congress intended "any" private Securities Act action to mean only federal-court actions (Opp. 22, 24), Section 77z-l(a) confirms Congress knew how to draft a federal-court limit. That provision expressly applies only to "each" Securities Act action "brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 77z-1(a)(1). And Plaintiffs are wrong in contending that Section 77z-1(c), which applies to "any" Securities Act action, applies only in federal court. Opp. 22. That provision simply requires all courts to apply the standard set forth in Rule 11 in assessing sanctions for specified abuses. 15 U.S.C. § 77z-1(c)(2). The same goes for Section 77z-1(b)(2): giving Section 77z-1(b)(1) its plain meaning would not impose the Federal Rules of Civil Procedure on state ***6** courts. *Contra* Opp. 23. Subprovision (b)(2) merely requires the parties to act *"as if* they were the subject of a continuing request for production" under those rules. 15 U.S.C. § 77z-1(b)(2) (emphasis added). Nor does Section 77z-1(a)(7)'s reference to "any Federal or State judicial action or administrative proceeding" support Plaintiffs. *Contra* Opp. 18. That specificity is necessary because, unlike Section 77z-1(b)(1), nothing limits Section 77z-1(a)(7) to a particular type of action. Pet. 20.

Plaintiffs cannot avoid Section 77z-1(b)(l)'s plain meaning by asserting that application in state court of a *different* subprovision-Section 77z-l(b)(4)-would be "constitutionally dubious" because it would allow one state court to enjoin another. Opp. 23-24. At most, that concern might warrant a narrow construction of Section 77z-1(b)(4)'s use of "[u]pon a proper showing." 15 U.S.C. § 77z- 1(b)(4). It would not justify ignoring Section 77z-1(b)(1)'s clear language.

Nothing Plaintiffs cite comes close to the statutory anomalies that led this Court (in what Plaintiffs deem "the most analogous precedent," Opp. 25) to read "convicted in any court" as excluding *foreign* convictions (but not state and federal ones). *Small*

*v. United States,* 544 U.S. 385, 391 (2005). Far more analogous are decisions holding "any" to encompass federal and state courts. Pet. 20.

2. Stymied by the statutory text, Plaintiffs invoke the constitutional-avoidance canon, which they claim raises a "strong presumption" Section 77z-1(b)(1) applies only in federal court. Opp. 19. But where, as here, there is no textual ambiguity, that canon "simply 'has no application.' " *Jennings v. Rodriguez,* 138 S. Ct. 830, 842 (2018).

***7** There is also no constitutional doubt to avoid. As Plaintiffs' primary authority indicates, this Court has not addressed whether Congress can dictate procedures for *state-law* claims in state courts. *Guillen v. Pierce Cnty.,* 31 P.3d 628, 729 (Wash. 2001) (en bane), *rev'd,* 537 U.S. 129 (2003); *see Jinks v. Richland Cnty.,* 538 U.S. 456, 464-65 (2003). But Congress's authority to dictate the procedures for litigating *federal* rights is well established.

Even Plaintiffs acknowledge this Court has long held Congress can impose procedural requirements as "part and parcel" of federal-law remedies it creates. Opp. 19; *e.g., Johnson v. Fankell,* 520 U.S. 911, 921 n.12 (1997); *Dice v. Akron, Canton & Youngstown R.R. Co.,* 342 U.S. 359, 363 (1952); *Cent. Vt. Ry. Co. v. White,* 238 U.S. 507, 512 (1915). Congress has exercised that authority for more than two centuries. *E.g.,* Act for the Government and Regulation of Seamen in the Merchant Service, Pub. L. No. 1-29, § 3, 1 Stat. 132, 132 (1790) (requiring local judges adjudicating sailors' federal right to seaworthy ship to appoint individuals to report to court on seaworthiness); *see Printz v. United States,* 521 U.S. 898, 905-07 (1997). After all, federalrl statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States,* 505 U.S. 144, 178-79 (1992). Just as Congress can provide that plaintiffs with Federal Employers' Liability Act claims are entitled to a jury notwithstanding contrary state-court procedures (*Dice,* 342 U.S. at 359), so too can Congress provide that the rights the Securities Act confers on investors come with limits on discovery.

***8** 3. Equally unavailing are Plaintiffs' attempts to dismiss the legislative history. They suggest that because Congress did not impose other supposedly "much more important" limitations on state courts, it could not have intended to impose state-court discovery restrictions. Opp. 26 (emphasis omitted). But Congress was particularly concerned with discovery-including "costs so burdensome that it is often economical for the victimized party to settle." H.R. CONF. REP. No. 104-369, at 31 (1995). Thus, while Congress did not override all state-court procedures, it limited discovery practices it deemed abusive and likely to lead to strike settlements.

That is why Congress used the same expansive "[i]n any private action" language in the parallel provision staying discovery for claims subject to the Reform Act's safe harbor (15 U.S.C. § 77z-2(f)): Congress sought to eliminate those discovery costs least likely to be related to any sort of meritorious claim. While Plaintiffs baldly assert that the safe-harbor discovery stay applies only in federal court (Opp. 24), Cyanindicates otherwise. 138 S. Ct. at 1066 (citing 15 U.S.C. § 77z-2 as example of provision applicable in state court).

Plaintiffs can identify no congressional purpose that squares with the statutory text. They speculate Congress may not have considered the possibility of "state court class actions under" the Securities Act. Opp. 22. But Congress granted state-court jurisdiction over such suits decades before it imposed the discovery stay on "any private action arising under" the Securities Act. *Cyan,* 138 S. Ct. at 1069.

## ***9 III. THIS CONTROVERSY IS JUSTICIABLE**

Despite Plaintiffs' best efforts to evade the Court's review, this controversy remains live. For months, Plaintiffs pressed for expansive discovery, vigorously advocating the discovery stay's inapplicability in state courts. Only after this Court called for a response to Petitioners' stay application did Plaintiffs supposedly realize they "do not much care" about receiving the discovery for which they have been hounding Petitioners since October 2020. Stay Opp. 2. Plaintiffs' last-minute promise to comply with

  

the statutory stay provision cannot satisfy the stringent mootness test applied to the voluntary cessation of challenged conduct; regardless, the controversy is capable of repetition, yet evading review.

1. Plaintiffs cannot carry their "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 190 (2000). A mere unilateral promise not to resume challenged conduct is insufficient. *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). And Plaintiffs limit their promise to adhering to the stay "in this matter." Stay Opp. App. A. This case is thus unlike *Already, LLC v. Nike, Inc.,* where Nike issued a judicially-enforceable covenant not to enforce its trademark against any of its competitor's *future* colorable imitations. 568 U.S. 85, 93 (2013). Plaintiffs make no promise not to "resume[]" the challenged conduct in " 'any *subsequent* action' " against Petitioners. *Id.* at 92 (quoting ***10** *Deakins v. Monaghan,* 484 U.S. 193, 201 n.4 (1988)) (emphasis added).

Nor has Plaintiffs' unilateral promise "completely and irrevocably eradicated the effects" of their prior actions, as would be necessary to moot this controversy. *Cnty. of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). Plaintiffs have not confessed error or tried to vacate the trial court's orders compelling discovery. They cite no authority for the proposition that these rulings "cannot have any preclusive effect" (or for their ability to so declare). Opp. 11 n.3. Nor does Plaintiffs' promise have the same consequences as the statutory stay, which would trigger their statutory preservation obligations and exposure to sanctions. 15 U.S.C. § 77z-1(b)(2)-(3).

Finally, Plaintiffs' gamesmanship "counsels against a finding of mootness." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 288 (2000). Their belated promise is a transparent "attempt[] to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Ibid.; contra* Opp. 11.

2. Regardless, this controversy is justiciable (and will remain so following any ruling on Petitioners' demurrer) because the question presented is capable of repetition, yet evading review. Pet. 27.

*First,* the "challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Kingdomware Techs. Inc. v. United States,* 136 S. Ct. 1969, 1976 (2016) (internal marks omitted). An order allowing statutorily barred discovery is short-lived, arising only "during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b)(1). Given this " 'short duration,' " the ***11** question whether the stay applies in state court "will likely 'evade review, or at least considered plenary review in this Court.' " *Globe Newspaper Co. v. Super. Ct.,* 457 U.S. 596, 602-03 (1982); *accord, e.g., Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 546-47 (1976).

Contrary to Plaintiffs' suggestion, this exception can apply even absent "judicially unstoppable events like elections or the conclusion of a pregnancy." Opp. 13. After all, a litigation stay could always prevent expiration of a short-lived order governing trial proceedings. And regardless, the exception applies if the issue "likely" will evade review. *See, e.g., Globe Newspaper,* 457 U.S. at 603 (order excluding press during criminal trial would evade review); *In re Reps. Comm. for Freedom of the Press,* 773 F.2d 1325, 1327-29 (D.C. Cir. 1985) (Scalia, J.) (sealing order applicable during civil trial would evade review).

Plaintiffs assert Petitioners should have "maintained" their application for a stay (Opp. 13)-even though it was Plaintiffs' own extraordinary maneuvering that led to its withdrawal. *See* Letter Withdrawing Stay Appl., No. 20A164 (May 13, 2021). But Petitioners sought only to stay the discovery orders, not the entire litigation-or the potential demurrer decision that Plaintiffs contend would moot the question presented. Opp. 12-13. And Plaintiffs "give [the Court] no reason to believe" it would or could have issued this considerably broader stay: while the discovery order is the subject of a final judgment within this Court's jurisdiction (Pet. 2), the ongoing state-court litigation is not. *Turner v. Rogers,* 564 U.S. 431, 441 (2011) (rejecting mootness on same ground).

***12** *Second,* Petitioners have a "reasonable expectation" they will "be subject to the same action again." *Kingdomware,* 136 S. Ct. at 1976. In arguing otherwise, Plaintiffs ignore the Underwriter Petitioners. Opp. 13 (discussing only "Pivotal"). As

  

Petitioners explained, Underwriter Petitioners are frequently sued in state-court Securities Act suits, having been cumulatively sued hundreds of times in just the three years since *Cyan.* Stay App. 175a-219a. Because many state courts have rejected the discovery stay's application (Pet. 13-14), their rights will likely again be denied. Plaintiffs have no response.

Nor can Plaintiffs plausibly assert that "adversarial presentation" is lacking. Opp. 14. Plaintiffs' lengthy defense of the trial court's order proves otherwise. Opp. 18-26. And the Court "can safely assume" that Plaintiffs' counsel have "other clients with a continuing live interest" in this question and thus will continue to vigorously defend their view of the statute. *Gerstein v. Pugh,* 420 U.S. 103, 110 n. 11 (1975).

Finally, Plaintiffs ignore that the Superior Court is itself a respondent, and that it will likely confront this issue again, including in cases involving these same Petitioners. Many Securities Act suits are filed in San Francisco-including over a dozen against several Petitioners since *Cyan.* Stay App. 175a-219a; *see Neb. Press Ass'n,* 427 U.S. at 546 (expired order capable of repetition because respondent court might enter similar order); *Gannett Co. v. DePasquale,* 443 U.S. 368, 377-78 (1979) (similar).

## *13 CONCLUSION

The petition should be granted.

Respectfully submitted,

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