No. 20-1541

IN THE

Supreme Court of the United States

PIVOTAL SOFTWARE, INC., ET AL.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Appeal for the State of California, First Appellate District

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry 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. Many of the Chamber's members have sold or will in the future sell stock to the public through offerings governed by the Securities Act of 1933 (the "Securities Act") and will be directly affected by the application of the laws at issue in this case.

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[1] All parties have consented to the filing of this brief as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

To remedy rampant abuse in federal securities litigation, Congress enacted the Private Securities Litigation Reform Act ("Reform Act"). As part of that statute, Congress provided for an automatic stay of discovery in *any* lawsuit brought under the Securities Act. 15 U.S.C. § 77z-1(b)(1). Because Congress says what it means and means what it says in legislation, the word *any* means just that, and the discovery-stay provision applies to any Securities Act claim—regardless of whether it is brought in state or federal court.

This straightforward interpretation is confirmed by the statute's structure. Elsewhere Congress made clear when it intended to limit the reach of a Reform Act provision to only those Securities Act claims brought before a federal tribunal. *E.g.*, *id.* § 77z-1(a)(1). And Congress used the broad word "any" in the discovery-stay provision while knowing that the Securities Act allowed state courts to entertain these claims. *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018).

Despite the clarity of the statute's text, structure, and history, Respondents demand more still: they contend that this Court should require an even more express statement from Congress before interpreting the discovery-stay provision to apply to proceedings in state court. But requiring more than what the plain language already provides would effectively impose a drafting tax on a coequal branch. To be sure, such a requirement might be warranted when a statute effects an unprecedented intrusion on a traditional area of state sovereignty. But because the discovery-

stay provision merely regulates how state courts should hear *federal* claims, history and precedent dating back to the Founding confirm that there is no such intrusion here.

This Court has repeatedly held that even ostensibly procedural law must be applied by state courts whenever that law is "part and parcel" of a federal claim. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (right to a jury trial); *see also*, *infra* § II-A. And this Court's precedent is consistent with earlier historical practice. Stretching back to the Founding, Congress has enacted statutes imposing obligations on state courts adjudicating federal claims. *See*, *infra* § II-B (discussing examples). Moreover, this Court has previously approved of applications of federal law in state court that go far beyond the discovery-stay provision. *See, e.g.*, *Jinks v. Richland Cnty*, 538 U.S. 456, 465 (2003) (federal tolling statute applied in state courts adjudicating *state* claims). Nothing so intrusive exists here: Congress merely provided for a discovery stay with respect to a *federal* claim.

Respondents' attempt to portray the discovery-stay provision as purely procedural, and thus inapplicable in state court, is unavailing. While that concept may, at a high level, be helpful in describing some aspects of the Reform Act, a statutory provision's label does not determine its applicability—the statute's text, structure, and history does. And given the unambiguous text of the discovery-stay provision, the only remaining inquiry is whether the law effects an unprecedented intrusion on an area of traditional state sovereignty such that the Court should demand even more clarity still from Congress. The discovery-

stay provision does no such thing. And even if the procedural–substantive distinction mattered here, the discovery-stay provision is sufficiently bound up with the outcome of the case to be viewed as substantive.

Finally, the Court should favor a textually permissible interpretation of a statute that furthers rather than obstructs a statute's purpose. The two key purposes of the Reform Act and its discovery-stay provision were to prevent extortionate settlements and to eliminate fishing expeditions used as a way of surviving the motion-to-dismiss stage. Both of those purposes can be easily thwarted if a plaintiff can evade the discovery-stay provision by filing in state court and obtaining premature discovery there.

No basis exists in history, precedent, or policy to demand that Congress use whatever magic words Respondents require. The discovery-stay provision applies in "any private action" under the Securities Act—whether in state or federal court.

ARGUMENT

I. THE PLAIN TEXT OF THE DISCOVERY-STAY PROVISION REQUIRES REVERSAL OF THE DECISION BELOW.

Among this Court's various canons of construction, one rule reigns supreme: where "statutory text is plain and unambiguous," this Court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). The Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

These principles make this case an easy one, for Congress said what it meant in the Reform Act and meant what it said there: the discovery-stay provision applies in "*any* private action" arising under the Securities Act. 15 U.S.C. § 77z-1(b)(1) (emphasis added). Because the word "any" means just that, the "judicial inquiry is complete," *Germain*, 503 U.S. at 254, and the discovery-stay provision applies in Securities Act suits brought in state court just the same as it applies to federal-court suits.

This straightforward textual interpretation is confirmed by the Reform Act's structure. Elsewhere in the statute, Congress explicitly limited the law's reach to claims brought in federal courts. For example, § 77z-1(a)(1) provides that "[t]he provisions of this subsection shall apply to each private action arising under this subchapter *that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure*." (emphasis added). Congress's inclusion of the italicized language demonstrates that it knew how to add qualifying language when it intended to limit a Reform Act provision to suits brought in federal court. Because Congress could have added such qualifying language to the discovery-stay provision as well—but chose not to—the Court should "decline to read such a limitation into [the] unambiguous text." *Millbrook v. United States*, 569 U.S. 50, 57 (2013).

Another structural clue is found in the Securities Act that the Reform Act amended. The Securities Act explicitly conferred jurisdiction on both federal and state courts. *See Cyan*, 138 S. Ct. at 1066 ("[T]o aid enforcement of those obligations, the statute created private rights of action" and "Congress authorized both federal and state courts to exercise jurisdiction

over those private suits"). Congress would therefore have been well aware that Securities Act suits could be brought in state courts—indeed, the Reform Act was amending a statute that explicitly authorized as much. By writing the discovery-stay provision to nevertheless apply in "any private action" under the Securities Act without qualification, Congress made its intent clear: the discovery-stay provision applies in state courts too.

And of course, "[a] broad construction of the word 'any' is hardly novel." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 n.1 (1995) (THOMAS, J., dissenting) (collecting examples). In fact, a broad interpretation of this broad word is the most natural. Ask any ordinary speaker of the English language whether "any private action [under the Securities Act]" has been brought by Zhung Tran and his fellow plaintiffs against Pivotal Software and its co-defendants. Undoubtedly, our hypothetical interlocutor would answer affirmatively. *Cf. Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

Respondents' arguments to the contrary ultimately distill to a request that the Court "add words to the law." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). Yet there is no compelling reason for the Court to do so. If Congress wanted to limit the discovery-stay provision to any private action *brought in federal court*, all it had to do was say so. Respondents are thus "left with nothing but the doubtful proposition that Congress sought to accomplish in a surpassingly strange manner what it

could have accomplished in a much more straightforward way." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (cleaned up).

II. THE PLAIN TEXT READING IS CONSISTENT WITH FEDERALISM PRINCIPLES.

Respondents contend that federalism principles require this Court to demand a clearer statement from Congress before interpreting the discovery-stay provision as applying to Securities Act claims brought in state court. *See* Brief in Opp. to Cert. at 19. That contention is incorrect. To start, a straightforward reading of the text already requires application of the discovery-stay provision in state court, and demanding that Congress say more imposes an unwarranted drafting tax. True, such a tax might be justified when a statute purportedly authorizes "an *unprecedented* intrusion into *traditional* state authority," and courts want to be extra sure that Congress truly meant what it said. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (emphasis added). But the discovery stay-provision here does not constitute an unprecedented intrusion into traditional state authority. Rather, it merely supplies a rule for state courts to follow if they open their door to plaintiffs asserting federal claims, which is well within historical practice. *Cf. Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 554 (2009) (THOMAS, J., concurring in part and dissenting in part) (presumption against preemption is not triggered where the regulation is in an area "where there has been a history of significant federal presence").

A. Precedent demonstrates consistency with federalism principles.

Far from being an unprecedented intrusion into traditional state authority, the discovery-stay provision fits comfortably within this Court's precedent, which has repeatedly required even ostensibly procedural federal law to be applied in state courts when such law is "part and parcel" of a federal claim. *Dice*, 342 U.S. at 363.

For example, in *Central Vermont Railway Co. v. White*, 238 U.S. 507, 512 (1915), the Court held that a state court should apply federal law on the burden of proof for contributory negligence, rather than the forum state's law. Although the Court recognized that state courts can generally "follow their own practice even in the trial of suits arising under the Federal law," it refused to treat the burden-of-proof law as a "mere matter of state procedure" because it was an integral part of the federal cause of action created by Congress. *Id.* at 512–13. The Court reached this holding despite the fact that burdens of proof are commonly viewed as "procedural." *See, e.g.*, Restatement (Second) of Conflict of Laws § 133 (1971).

In *Davis v. Wechsler*, 263 U.S. 22 (1923), the Court held that a state pleading rule could not be applied to defeat the assertion of a federal claim brought in state court: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 24; *see Brown v. W. Ry. of Ala.*, 338 U.S. 294, 295–96 (1949) (reversing a state

court's dismissal of a federal claim based on a local rule construing the complaint against the pleader).

This Court's decision in *Dice* is particularly instructive. There, the Court required an ostensibly procedural federal rule be applied in state courts hearing claims brought under the Federal Employers' Liability Act ("FELA"). *Dice,* 342 U.S. at 363. An early version of FELA provided that "[a]ll questions of negligence and contributory negligence shall be for the jury." Pub. L. No. 59-219, § 2, 34 Stat. 232 (1906). But after that statute was held unconstitutional on other grounds in *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463 (1908), Congress passed a revised version of the law—this time omitting the clause providing for a jury trial. *See* Pub. L. No. 60-100, § 2, 35 Stat. 65, 65–66 (1908). Apparently, a majority of legislators thought that the jury-trial language would be surplusage in light of the Seventh Amendment. *See* Hearings Before S. Comm. on Educ. and Lab. on S. 5307, 60th Cong. 8–9, 45–46 (1908).

Despite those changes to the statute, the Court in *Dice* held that the right to a jury trial was "part and parcel" of the remedy that Congress conferred to injured employees under FELA and a state court could not apply conflicting state rules that would permit the judge to decide whether a contractual release was fraudulently obtained. 342 U.S. at 363. To deprive plaintiffs of a jury on that question was "to take away a goodly portion of the relief which Congress has afforded them." *Id.* According to this Court, the right to a jury trial is "too substantial a part of the rights

accorded by the Act to permit it to be classified as a mere 'local rule of procedure.'" *Id.*[2]

The same can be said for the discovery-stay provision. It is part and parcel of the protections afforded for defendants under the Reform Act. It ensures that a complaint under the Securities Act be sufficient to survive a motion to dismiss before forcing defendants to undertake the burdens of discovery. That protection is too substantial a part of the Reform Act to be disregarded in state courts.

This Court's holding in *Adams v. Maryland*, 347 U.S. 179, 180 (1954), is likewise instructive. There, the Court considered a federal statute conferring immunity to witnesses who testified before Congress. *Id.* at 181. Such immunity was to apply in any criminal proceeding "in any court." *Id.* This Court rejected the argument that "any court" was limited to federal courts only: Congress's "[l]anguage could be no plainer" and Congress was "well aware that an

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[2] Four Justices in *Dice* dissented while concurring in the judgment. 342 U.S. at 364 (FRANKFURTER, J., concurring in the judgment). But even they did not dispute the core proposition that federal law that is part and parcel of a federal claim applies in state courts. Rather, the dissenting Justices simply disagreed that a jury trial was in fact part and parcel of a FELA claim. *See id.* at 366–67. The dissent in *Dice* took the view that the absence of any right to a jury in the statutory text, coupled with Congress's knowledge that state courts would exercise concurrent jurisdiction over FELA claims, meant that state courts should be free to follow their own procedures in such claims. *Id.* at 366–68. But even the dissent's reasoning applies in Petitioners' favor here: Congress enacted the discovery-stay provision with broad language calling for it to be applied to "any" Securities Act claim knowing that state courts would exercise concurrent jurisdiction over such claims.

ordinary person would read the phrase 'in any court' to include state courts." *Id.* at 181–82; *see also id.* at 184 (JACKSON, J., concurring) ("If words mean anything, the statute extends its protection to all witnesses, to all testimony, and in all courts."). The Court also upheld the statute's constitutionality and held that "since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [the statute], even though it affects their rules of practice." *Id.* at 183.

And it is immaterial that the discovery-stay provision protects defendants rather than plaintiffs. A federal law that sets limits on the enforcement of a federal cause of action must be enforced all the same whether in federal court or state court.

In *Collector of Internal Revenue v. Hubbard*, 79 U.S. 1, 15 (1870), the Court held that a statute requiring a taxpayer to appeal to the Commissioner of Internal Revenue before bringing suit in "any court" applied in state courts as in federal courts. Congress was free to "add new conditions to the exercise of that right [it had created] whenever in its discretion the public interest might require such additional regulation." *Id.* at 15. "Unquestionably," then, "if the provision is a good bar in the Federal courts, it is a good bar in all courts acting under the same act of Congress." *Id.*

Atlantic Coast Line Railroad Co. v. Burnette, 239 U.S. 199 (1915), is also a good example of this principle. There, this Court held that a federal statute of limitations—rather than a longer state statute of limitations—must be applied by state courts hearing federal claims. *Id.* at 201. Just as a court cannot "allow substantive rights to be impaired under the

name of procedure," the Court reasoned, when "a law that is relied on as a source of an obligation" and "*sets a limit* to the existence of what it creates," courts applying that law "have been disinclined to press the obligation farther." *Id.* (emphasis added). In affirming the dismissal of the case in favor of the defendant, the Court concluded: "If it be available in a state court to found a [federal] right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a state as in those of the United States." *Id.*

Similarly, in *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), the Court held that a state court erred in awarding prejudgment interest under a local rule in a FELA action. *Id.* at 336. Following the reasoning in *Dice*, the Court held that such interest was too intertwined with a defendant's potential liability to be treated as a mere rule of local procedure. *Id.*

As these cases demonstrate, despite state courts generally retaining authority to dictate their own procedures, *e.g.*, *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990), they are obligated to apply the federal law that Congress has designated to govern the adjudication of a federal claim. Here, Congress made a judgment that defendants in "any" Securities Act suit should not be subject to discovery until after the plaintiffs sufficiently state a claim. We need only look to the text and structure of the statute itself for confirmation that the right to be free from premature discovery is part and parcel of the federal claim: the discovery-stay provision is in the very same statute giving rise to the underlying cause of action. *Cf. Johnson v. Fankell*, 520 U.S. 911, 921 n.12 (1997)

(distinguishing between a preexisting background rule of federal procedure from the jury trial in *Dice* on the grounds that in *Dice*, "Congress had provided *in FELA*" for the procedure in question).

Such a rule makes sense too. "The power to create rights of action should include the power to specify a fitting means of judicial enforcement." Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 1001 (2001) (arguing that there is a distinction between federal regulation of state procedure in state-law cases, and federal regulation of state procedure in cases arising under federal law). Or, in this Court's words, when a state has "opened its courts" to "enforce federally created rights," the parties are "entitled to the benefit of the full scope of these rights," *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942), and at the same time, courts must adhere to the "limit[s]" of those rights, *Atl. Coast Line R. Co.*, 239 U.S. at 201.

B. Historical practice dating to the Founding demonstrates consistency with federalism principles.

The Tenth Amendment reserves to the States all powers not delegated to the federal government. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); 3 J. Story, Commentaries on the Constitution of the United States § 1900 (1833). But as this Court recognized in *Printz v. United States*, 521 U.S. 898, 907 (1997), the federal government's power to impose "federal prescriptions" on state courts is "implicit in one of the

provisions of the Constitution, and was explicit in another." The implicit power is found in Article III, which created only one Supreme Court and left the creation of lower federal courts to Congress's discretion. With this structure, it "was obvious that the Supreme Court alone could not hear all federal cases throughout the United States," *id.*, and thus, that federal claims would be heard by state courts. *Cf.* Bellia, *supra*, at 958 n.62. ("In the early years of the Union, state courts were the only forum available for enforcement of many federal claims. Not until 1875 did Congress confer general federal question jurisdiction on district courts[.]") (citing Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470). The explicit power is found in the Supremacy Clause, which provides that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

Consistent with these principles, several Founding-era statutes required state courts to apply even ostensibly procedural laws when adjudicating federal claims.

For example, state courts resolving controversies under federal law about the seaworthiness of a vessel had to appoint "three persons in the neighbourhood" who were "most skil[l]ful in maritime affairs" to provide a report to the court expressing their opinion on the ship's seaworthiness. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132. Other statutes required state courts considering applications for admission to the United States to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, and to transmit certain naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1

Stat. 566, 567. The Patent Act of 1790 created a remedy for patent infringement in the form of an "action on the case" and provided a right to a jury trial, even though such claims would be pressed in state courts. Act of Apr. 10, 1790, ch. 7, § 4, 1 Stat. 109, 111 (providing that a patentee was entitled to "damages as shall be assessed by a jury"); Donald S. Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 Wash. L. Rev. 633, 635–36 (1971) (state courts had jurisdiction over patent cases until the Patent Act of 1800).[3]

These early statutes "provid[e] contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010). The existence of these statutes demonstrates that requiring a state court to apply a law governing the enforcement of a federal claim—such as the discovery-stay provision here—does not run afoul of any principle of federalism. That they imposed ostensibly procedural rules on state courts reaffirms that the discovery-stay provision presents no unprecedented intrusion into an area of traditional state sovereignty.

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[3] Other statutes imposed more substantive obligations still. *See* Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 547, 548 (permitting state courts to take proof of the claims of the Canadian refugees who had assisted the United States during the Revolutionary War); Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577, 577–78 (requiring state courts to order the deportation of alien enemies in times of war).

C. This Court has approved applications of federal law in state court that have gone much further than the stay provision here.

On several occasions this Court has gone even further in imposing federal law on state courts—in some instances, over the objections of other members of this Court that doing so violated state sovereignty. For example, in *Jinks v. Richland County*, 538 U.S. 456, 465 (2003), the Court upheld the constitutionality of a federal tolling statute that applied to state-law claims in state court if they were initially brought in federal court. Subsequently, in *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), the Court upheld the constitutionality of that tolling statute even when the statute was interpreted as adopting a "stop clock" approach (rather than a "grace period" approach) that yielded longer tolling periods. *Id.* at 606–07. And in *Haywood v. Drown*, 556 U.S. 729 (2009), the Court held that a state court could not refuse to hear federal claims where it has jurisdiction to adjudicate analogous state-law claims. Members of this Court have stated (in dissent) that those intrusions upon state sovereignty violated the Constitution. *See id.* at 742 (THOMAS, J., dissenting); *Artis*., 138 S. Ct. at 614 (GORSUCH, J., dissenting).

But a discovery stay with respect to a federal claim represents no such intrusion. In *Haywood*, Justice Thomas distinguished between forcing state courts to entertain federal claims when state law deprives them of jurisdiction to do so (which in his view would be unconstitutional) and requiring that the state court follow federal law *"if it adjudicates the claim"* (which would be constitutional). 556 U.S. at 751 (THOMAS, J.,

dissenting) (emphasis added). This is the latter case: Congress has said that the discovery-stay provision applies in "any" action brought under the Securities Act, so the Supremacy Clause requires that state courts that entertain such claims abide by that rule. And in *Artis*, Justice Gorsuch reasoned that the majority's interpretation would render the federal tolling statute an "unconstitutional intrusion on the core state power to define the terms of *state law claims* litigated in state court proceedings." 138 S. Ct. at 614 (GORSUCH, J., dissenting) (emphasis added). But here, the discovery-stay provision requires nothing of state courts in their adjudication of *state*-law claims. Rather, it merely dictates a rule that applies when state courts hear *federal* Securities Act claims.

D. Respondents' attempt to portray the discovery-stay provision as purely procedural is irrelevant and wrong.

Respondents try to portray the discovery-stay provision as purely procedural, and thus, inapplicable to Securities Act claims brought in state courts. But that argument overreads *Cyan v. Beaver County Employees Ret. Fund*, 138 S. Ct. 1061 (2018), which used the procedural and substantive labels as a general descriptor without holding that the label given to a provision dictates its applicability in state court, as opposed to the statute's text, structure, and history. *See id.* at 1067. Nor did *Cyan* dispute the oft-recognized reality that the distinction between procedure and substance is difficult to draw. *See, e.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy . . . .").

Often the law endows "procedural" rights with "substantive" status to be applied in state and federal courts alike: The Fifth Amendment confers a right to "due process of law" and a right not to be "twice put in jeopardy" for the same offense. *See* U.S. Const. amend. V. The Sixth Amendment confers rights to certain procedures, like confrontation of witnesses and a speedy and public trial, in criminal prosecutions. *See* U.S. Const. amend. VI. Federal Rule of Evidence 502 states that the attorney-client privilege and work-product rule "applies to state proceedings." Simply put, substantive protections are often found in "procedural" rights. *Cf. Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 503 (1986) ("The automatic stay provision of the Bankruptcy Code, § 362(a), has been described as 'one of the fundamental debtor protections provided by the bankruptcy laws.'") (quoting S. Rep. No. 95-989, at 54 (1978)). Hence, classifying a provision as "procedural" or "substantive" cannot resolve the issue of state-court application here.

Instead, in light of the clear text, the only remaining inquiry turns on history: whether the law effects an unprecedented intrusion on an area of traditional state sovereignty. And as explained, *supra* § II-A–C, the discovery-stay provision, far from being an unprecedented intrusion of traditional state authority, falls well within historical tradition and this Court's precedent. To the extent the "procedure" or "substance" label has any purchase here, it serves only to reflect and approximate what the historical practice has been, as historical "traditions are themselves the stuff out of which the Court's principles are to be formed." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–96 (1990) (SCALIA, J., dissenting). Where there is a tradition of

state courts applying federal rules that Congress mandated to govern the enforcement of a federal cause of action, even in state courts, such "tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of [constitutional] adjudication devised by this Court." *Id.* However "abstract[ly]" labeled, the discovery-stay provision applicable to a federal securities action does not break with this tradition.

But even if the label mattered, Respondents' efforts to depict the discovery-stay provision as purely procedural fall short. The outcome-determinative nature of a discovery stay would make it sufficiently "substantive" to justify state-court application. *Cf.* 3 Cyc. of Fed. Proc. § 6:46 (3d ed. July 2021 Update) ("The relevant inquiry is . . . whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce the state rule would be likely to cause a plaintiff to choose the federal court."). Unless and until a plaintiff can survive a motion to dismiss, defendants are not to be subject to discovery. Indeed, preventing early discovery from being weaponized to extort meritless settlements was a major impetus behind the Reform Act—reflecting the reality that the timing of discovery can be outcome-determinative as a practical matter. *See, infra* § III. Treating the discovery-stay provision as inapplicable to suits brought in state courts gives short shrift to Congress's judgment that while plaintiffs should be entitled to recover for violations of the Securities Act, defendants should be free from discovery until after the plaintiffs have sufficiently stated a claim.

There seems to be little doubt that if the situation were reversed—if federal law guaranteed discovery by *prohibiting* any pre-trial stay when adjudicating federal securities actions—Respondents would clamor for its application in state court. This Court's holding should not turn on whether it benefits defendants or plaintiffs. The plain text mandates application of the discovery-stay provision in state and federal court. That text implements the clear legislative objective of preventing discovery burdens from unfairly driving outcomes in federal securities cases. And there is nothing in the Constitution or our history that would bar implementation of such an objective in state or federal court.

III. DECLINING TO APPLY THE DISCOVERY-STAY PROVISION TO PROCEEDINGS IN STATE COURTS WILL THWART THE PURPOSE OF THE REFORM ACT.

A key purpose of the Reform Act was to curb abusive securities litigation that "was being used to injure 'the entire U.S. economy.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). An important part of this effort was the discovery-stay provision, which was necessary because the "cost of discovery often forces innocent parties to settle frivolous securities class actions." H.R. Rep. No. 104-369, at 37 (1995); *see also In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004) ("The legislative history of the [Reform Act] indicates that Congress enacted the discovery stay to prevent plaintiffs from filing securities class actions with the intent of using the discovery process to force a coercive settlement."). A twin aim of the discovery-stay provision was preventing plaintiffs from filing meritless lawsuits in order to unlock the keys to

discovery "in the hopes of finding a sustainable claim not alleged in the complaint." S. Rep. No. 104-98, at 14 (1995).

To achieve these goals, Congress provided that in any private action under the Securities Act, the filing of a motion to dismiss requires a stay of discovery until the court resolves that motion. *See* 15 U.S.C. § 77z-1(b)(1). Yet neither of these purposes can be achieved if the discovery stay-provision is not applied to "any" private action brought under the Securities Act. *Cf.* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 72 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."). Plaintiffs hoping to use litigation and abusive discovery as a means of extorting a settlement would remain free to do so: they would simply need to file their case in state court.

It is well understood that "[r]equesting parties make overbroad requests, file frivolous suits, and otherwise seek to intentionally drive the cost of e-discovery up" and that "[p]roducing parties have no choice but to settle or pay exorbitant e-discovery costs." Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 Wm. & Mary L. Rev. 631, 664 (2014); *see also* Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 Cardozo L. Rev. 1599, 1656–57 (2016) ("[D]iscovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs in some cases."). Such discovery burdens are particularly asymmetric in

Securities Act claims, where plaintiffs will want and need more discovery from the defendants than vice versa.

And discovery abuses are particularly acute in state courts, where the standard for discovery might be more lenient. *See, e.g.*, Fundamentals of Litig. Prac. Ch. 11 Introduction (2021 ed.) ("State laws typically permit a wider scope of relevancy and broader discovery."); Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8B-5 (June 2021 Update) ("Discovery proceedings are subject to much stricter control in federal courts."). It should come as no surprise, then, that from 2011 to 2015, the median settlement amount for Section 11 claims filed in California state court was more than twice the median settlement amount in federal court. *See* Joseph Grundfest, Sasha Aganin, and Joseph Schertler, *After* Cyan*: Potential Trends in Section 11 Litigation*, Law360 (Mar. 27, 2018), https://www.law360.com/articles/1026323/after-cyan-potential-trends-in-section-11-litigation.

Refusing to apply the stay in state courts would allow plaintiffs to engage in state-court fishing expeditions to avoid dismissal of an otherwise meritless case. State courts often allow—or even encourage—plaintiffs to use discovery as a way to find a claim capable of surviving a motion to dismiss. *See, e.g.*, *Mattco Forge, Inc. v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1436 n.3 (1990) ("Pleading deficiencies generally do not affect either party's right to conduct discovery and this right (and corresponding obligation to respond) is particularly important to a plaintiff in need of discovery to amend its complaint." (internal citations omitted)). And materials discovered in a state court action might be used in a later or parallel

federal suit. *See Glock v. Glock, Inc.*, 797 F.3d 1002, 1007 (11th Cir. 2015) ("As a general rule, in United States litigation, to help prosecute or defend their lawsuits, parties may use any evidence they lawfully possess" and a plaintiff need not "apply to the court in either lawsuit before being able to, say, draft a complaint in the second case based on information contained in the documents discovered in the first case.").

Thus, the goals of the discovery-stay provision will be thwarted if plaintiffs can evade that provision by simply bringing their claims in state court. The Congress that passed a statute specifically designed to curb litigation and discovery abuses—by automatically staying discovery in *any* private action brought under the Securities Act—would not have intended such a bizarre result.

CONCLUSION

For the foregoing reasons, the *Amicus* respectfully requests that the Court reverse the trial court's decision that the discovery-stay provision does not apply in state court.

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