

STATE COURTS LACK JURISDICTION TO HEAR SECURITIES ACT CLASS ACTIONS, BUT THE FREQUENT FAILURE TO ASK THE RIGHT QUESTION TOO OFTEN PRODUCES THE WRONG ANSWER

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In the mid-1990s, Congress enacted the Private Securities Litigation Reform Act (the “PSLRA”) and the Securities Litigation Uniform Standards Act (“SLUSA”), the most significant reforms of the laws governing private securities litigation and related class actions in six decades. Congress intended these Acts to ensure that securities class actions would be litigated in federal court and subject to heightened federal standards. Nevertheless, dozens of cases have held that actions brought on a class-wide basis that solely assert claims under the Securities Act of 1933 can proceed in state court. At the same time, dozens of other cases have conversely held that these cases can proceed only in federal court. The dispute over these cases remains unresolved in the case law (in large part because there is generally no available appellate review of decisions by trial-level courts on this issue).

The conflicting patch-quilt of decisions is the result of two recurring errors. First, in resolving remand motions, many courts focus solely on whether a class action brought in state court can be removed to federal court under a specialized right of removal enacted by SLUSA. This is the wrong question. This Article contends that the right question is a threshold one: whether state courts have subject-matter jurisdiction over class actions that assert Securities Act claims. A provision of SLUSA — its “Jurisdictional Amendment,” Section 101(a)(3)(A) — provides that they do not. A second recurring error is that courts misread SLUSA’s Jurisdictional Amendment and hold that state courts retain subject-matter

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jurisdiction over class actions that assert Securities Act claims. These courts fail to recognize that an assumption on which their interpretations rely has been squarely rejected by the Supreme Court. Further, their interpretation is inconsistent with the legislative history and purpose of SLUSA and the precepts of federalism.

As this Article discusses, SLUSA vests exclusive jurisdiction over class actions asserting Securities Act claims in the federal courts. When class actions asserting such claims are brought in state court, they should be dismissed for lack of subject-matter jurisdiction, or removed to federal court under the general removal statute in the Judicial Code, where they will be subject to the PSLRA's reforms.

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INTRODUCTION

In the mid-1990s, Congress enacted two sweeping amendments of the laws regarding private securities litigation: the Private Securities Litigation Reform Act of 1995 (the “PSLRA”)¹ and the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”).² The PSLRA was enacted in response to perceived abuses in securities litigation and instituted numerous reforms,³ but it had an “unintended consequence.” The PSLRA prompted plaintiffs to shift from bringing securities class actions in federal court to bringing them in state court, which allowed them to evade many of the PSLRA’s reforms.⁴ Congress enacted SLUSA to stem the “shift[] from Federal to State courts” and to require that significant securities class actions be litigated in federal court, where they would be subject to the strictures of the PSLRA.⁵

Since SLUSA was enacted, however, contentious recurring litigation has arisen and continues to arise about whether securities class actions may continue to proceed in state court and thereby evade the PSLRA. In particular, litigants repeatedly contest whether “Exclusively Federal Securities Class Actions” — class actions that allege only claims under the Securities Act of 1933 (the “Securities Act”) with no pendent state law claims — can proceed in state court. Courts uniformly agree that class actions brought in state court that allege both Securities Act claims and state law claims should proceed in federal court. But, paradoxically, courts

1. Pub. L. 104-67, 109 Stat. 737.

2. Pub. L. 105-353, 112 Stat. 3227.

3. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); see also *infra* Part I.B.

4. See *Dabit*, 547 U.S. at 82; see also *infra* Part I.B.

5. See Securities Litigation Uniform Standards Act, Pub. L. 105-353, § 2(2), (5), 112 Stat. 3227, 3227; *Dabit*, 547 U.S. at 82; see also *infra* Parts I.B, V.

are deeply divided over whether Exclusively Federal Securities Class Actions that allege *no* state law claims may proceed in state court (where these class actions would not be subject to many of the requirements of and protections enacted by the PSLRA) or whether they may only proceed in federal court (where they would be subject to the PSLRA's requirements). In the past decade and a half, over three dozen separate trial-level court decisions have been issued on this subject. These decisions have come out with hopelessly conflicting answers, both in terms of their results and their reasoning.⁶ The ability to obtain appellate review of these decisions is near

6. Compare *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 WL 2183035, 2015 U.S. Dist. LEXIS 48759 (D. Md. Apr. 14, 2015), *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC et al., 2012 WL 3647409, 2012 U.S. Dist. LEXIS 119924 (N.D. Cal. Aug. 23, 2012), *Brady v. Kosmos Energy Ltd.*, Nos. 3:12-CV-0373-B, 3:12-cv-0781-B, 2012 WL 6204247, 2012 U.S. Dist. LEXIS 176567 (N.D. Tex. July 10, 2012), *Northumberland Cnty. Ret. Sys. v. GMX Res., Inc.* 810 F. Supp. 2d 1282 (W.D. Okla. 2011), *Kramer v. Fed. Nat'l Mortg. Ass'n (In re Fannie Mae 2008 Sec. Litig.)*, Nos. 08 Civ. 7831(PAC), 09 Civ. 1352(PAC), 2009 WL 4067266, 2009 U.S. Dist. LEXIS 109888 (S.D.N.Y. Nov. 24, 2009), *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009), *Pinto v. Vonage Holdings Corp.*, No. 07-0062 (FLW), 2007 WL 1381746, 2007 U.S. Dist. LEXIS 33287 (D.N.J. May 7, 2007), *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964 (ERK), 2007 WL 778485, 2007 U.S. Dist. LEXIS 17671 (E.D.N.Y. Mar. 13, 2007), *Rovner v. Holdings Vonage Corp.*, No. 07-178 (FLW), 2007 WL 446658, 2007 U.S. Dist. LEXIS 8656 (D.N.J. Feb. 7, 2007), *Purowitz v. DreamWorks Animation SKG, Inc.*, No. CV 05-6090 MRP (VBKx), 2005 WL 6794770, 2005 U.S. Dist. LEXIS 46911 (C.D. Cal. Nov. 15, 2005), *Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229, 2005 U.S. Dist. LEXIS 44720 (W.D.N.C. Oct. 13, 2005), *In re King Pharm., Inc.*, 230 F.R.D. 503 (E.D. Tenn. 2004), *Kulinski v. Am. Elec. Power Co., Inc.*, No. C-2-03-412, 2003 WL 24032299, 2003 U.S. Dist. LEXIS 26447 (S.D. Ohio Sept. 19, 2013) (report and recommendation), *adopted*, slip op. (S.D. Ohio Jan. 7, 2004), ECF No. 31, *Alkow v. TXU Corp.*, Nos. 3:02-2738-K, 3:02-CV-2379-K, 2003 WL 21056750, 2003 U.S. Dist. LEXIS 7900 (N.D. Tex. May 8, 2003), *and Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003) (holding, for varying and sometimes conflicting reasons, that Exclusively Federal Securities Class Actions should proceed only in federal courts), *with Rosenberg v. Cliffs Natural Res.*, No. 1:14CV1531, 2015 WL 1534033, 2015 U.S. Dist. LEXIS 48915 (N.D. Ohio Mar. 25, 2015), *Plymouth Cnty. Ret. Sys. v. Model N., Inc.*, No. 14-cv-04516-WHO, 2015 WL 65110, 2015 U.S. Dist. LEXIS 1104 (N.D. Cal. Jan. 5, 2015), *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 WL 4330787, 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014), *Desmarais v. Johnson*, Nos. C 13-03666 WHA et al., 2013 WL 5735154, 2013 U.S. Dist. LEXIS 153165 (N.D. Cal. Oct. 22, 2013), *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 WL 5596965, 2013 U.S. Dist. LEXIS 147569 (N.D. Cal. Oct. 11, 2013), *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 WL 5526621, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013), *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, 2013 WL 2318459 (Cal. Super. Ct. Santa Clara Cnty. May 28, 2013), *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754, 2013 U.S. Dist. LEXIS 146465 (N.D. Cal. Jan. 23, 2013), *Niitsoo v. Alpha Natural Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012), *Harper v. Smart Techs., Inc.*, No. 4:11-cv-05232-SBA, slip op. (N.D. Cal. Sept. 28, 2012), ECF No. 42, *Young v. Pac. Biosci. of Cal., Inc.*, No. 5:11-cv-05668 EJD, 2012 WL 851509, 2012 U.S. Dist. LEXIS 33695 (N.D. Cal. Mar. 13, 2012), *W. Va. Laborers Trust Fund v. STEC, Inc.*, No. SACV 11-01171-JVS (MLGx), 2011

non-existent.⁷ Every year, plaintiffs bring new Exclusively Federal Securities Class Actions in state court, and defendants attempt to shift such litigation to federal court. Where these suits are adjudicated is generally unpredictable, and may depend on the district in which the case happens to be heard, or even the judge within the district that the parties happen to draw. Today, seventeen years after SLUSA was enacted, courts are no closer to coming to a consensus about the treatment of Exclusively Federal Securities Class Actions brought in state court. To the contrary, the case law, defined by an ever-increasing number of non-binding trial-level court decisions, grows ever more disharmonious.⁸

WL 6156945, 2011 U.S. Dist. LEXIS 146846 (C.D. Cal. Oct. 7, 2011), *Luther v. Countrywide Fin. Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App. 2d Dist. 2011), *W. Palm Beach Police Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 WL 1099815, 2011 U.S. Dist. LEXIS 30607 (S.D. Cal. Mar. 24, 2011), *Layne v. Countrywide Financial Corp.*, Nos. BC389208, BC389332, slip op. (Cal. Super. Ct. L.A. Cnty. Feb. 5, 2010), *available at* 2010 WL 1637425, *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972, 2009 U.S. Dist. LEXIS 132947 (N.D. Ohio Feb. 12, 2009), *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP (MANx), 2008 WL 9476380, 2008 U.S. Dist. LEXIS 123896 (C.D. Cal. July 8, 2008), *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02391-JEC, 2007 WL 2729011, 2007 U.S. Dist. LEXIS 68513 (N.D. Ga. Sept. 14, 2007), *Bernd Bildstein IRRA v. Lazard Ltd.*, No. 05 CV 3388 RJDRML, 2006 WL 2375472, 2006 U.S. Dist. LEXIS 61395 (E.D.N.Y. Aug. 15, 2006), *Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK (MCx), 2005 WL 6963459, 2005 U.S. Dist. LEXIS 14202 (C.D. Cal. June 28, 2005), *Higginbotham v. Baxter Int'l, Inc.*, Nos. 04 C 4909, 04 C 7906, 2005 WL 1272271, 2005 U.S. Dist. LEXIS 12006 (N.D. Ill. May 25, 2005), *Zia v. Med. Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004), *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distribution, Inc.*, No. 8:04-cv-961-T-26MAP, 2004 WL 6246913, 2004 U.S. Dist. LEXIS 32014 (M.D. Fla. June 25, 2004), *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116 (D.N.H. 2004), *Williams v. AFC Enters., Inc.*, No. CIV 103-CV-2490-TWT, 2003 WL 24100302, 2003 U.S. Dist. LEXIS 28623 (N.D. Ga. Nov. 20, 2003), *appeal dismissed for want of jurisdiction*, 389 F.3d 1185 (11th Cir. 2004), *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp.*, No. 03CV0714BTM(JFS), 2003 WL 23509312, 2003 U.S. Dist. LEXIS 15832 (S.D. Cal. Aug. 27, 2003), *Martin v. BellSouth Corp.*, No. 1:03-CV-728-WBH, 2003 WL 26476752, 2003 U.S. Dist. LEXIS 28605 (N.D. Ga. July 3, 2003), *Nauheim v. Interpublic Grp. of Cos.*, No. 02-C-9211, 2003 WL 1888843, 2003 U.S. Dist. LEXIS 6266 (N.D. Ill. Apr. 16, 2003), *and Miller v. Waste Mgmt., Inc. (In re Waste Mgmt., Inc. Sec. Litig.)*, 194 F. Supp. 2d 590 (S.D. Tex. 2002) (holding, for varying and sometimes conflicting reasons, that Exclusively Federal Securities Class Actions may proceed in state courts); *see also infra* Parts III, VI.

7. *See infra* note 205.

8. Commentators are no less split. Compare Stephen O'Connor, Note, *The Securities Act of 1933: A Jurisdictional Puzzle*, 79 BROOK. L. REV. 1233 (2014), Mitchell A. Lowenthal & Timothy M. Haggerty, *Jurisdictional Struggle Continues Over 1933 Act Class Suits*, N.Y. L.J., June 14, 2010, at S4, Michael Serota, Student Short, *(Mis)Interpreting SLUSA: Closing the Jurisdictional Loophole in Federal Securities Class Actions*, 7 BERKELEY BUS. L.J. 162 (2010), Mitchell A. Lowenthal & Timothy M. Haggerty, *Under SLUSA, State Courts Lack Jurisdiction to Hear Class Actions Asserting Claims Under the Securities Act*, 39 SEC. REG. & L. REP. (BNA) 1003 (2007), William B. Snyder, Jr.,

The question of whether Exclusively Federal Securities Class Actions can proceed in state courts usually arises in the context of removal, i.e., where a plaintiff brings an Exclusively Federal Securities Class Action in state court and a defendant removes the action to federal court. The plaintiff typically then files a motion to remand, and the federal court must determine whether removal was proper.

The unresolved debate about the proper forum for Exclusively Federal Securities Class Actions continues unabated because of two recurring errors. The first error is that many courts simply assume that state courts have subject-matter jurisdiction over such actions and resolve remand motions simply by looking to SLUSA's unique removal provisions.⁹ SLUSA revised Section 16 of the Securities Act,¹⁰ which, in addition to making other changes, grants defendants a new right to remove certain class actions involving nationally traded securities, per Section 16(c).¹¹ When faced with a removal and a motion to remand, federal courts often focus single-mindedly on this new Section 16(c) and attempt to address whether the right of removal it provides covers Exclusively Federal Securities Class Actions.¹² But the propriety of removal is a secondary question; the threshold question is whether state courts have subject-matter jurisdiction over Exclusively Federal Securities Class Actions in the first place. If state courts lack such jurisdiction, SLUSA's specialized removal provision is irrelevant — the class action can be removed under the Judicial Code's removal provision, 28 U.S.C. § 1441.¹³

As this Article explains, state courts are no longer courts of competent jurisdiction in class actions asserting Securities Act claims. As originally enacted in 1933, the Securities Act vested subject-matter jurisdiction over Securities Act claims concurrently in federal and state courts. But Section

Comment, *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669 (2007), and Andrew J. Morris & Fatima A. Goss, *Why Claims Under the Securities Act of 1933 Are Removable to Federal Court*, 36 SEC. REG. & L. REP. (BNA) 626 (2004) (arguing, for varying and sometimes conflicting reasons, that Exclusively Federal Securities Class Actions should proceed only in federal courts), with J. Tyler Butts, Note, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devices, and the Supreme Court's Decisive Solution*, 1 WM. & MARY BUS. L. REV. 169 (2010), and Jordan A. Costa, Note, *Removal of the Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 ST. JOHN'S L. REV. 1193 (2004) (arguing, for varying and sometimes conflicting reasons, that Exclusively Federal Securities Class Actions may proceed in state courts).

9. See *infra* Part VI.

10. Section 16 of the Securities Act is codified at 15 U.S.C. § 77p. Citations by authorities to "Section 16" or to "Section 77p" refer to this same section.

11. See *infra* Part II.C.3.

12. See *infra* Part VI.

13. See *infra* Part III.B.

101(a)(3)(A) of SLUSA (the “Jurisdictional Amendment”) expressly amended the Securities Act’s jurisdictional provision to divest state courts of subject-matter jurisdiction over Exclusively Federal Securities Class Actions.¹⁴ Because state courts no longer have subject-matter jurisdiction over these actions, such actions cannot be adjudicated there, and can be removed to federal court under the Judicial Code’s general “federal question” removal provision.¹⁵ Until recently, every one of those courts that did address SLUSA’s Jurisdictional Amendment universally agreed that it divested state courts of subject-matter jurisdiction over Exclusively Federal Securities Class Actions,¹⁶ as perhaps most thoroughly explained in a 2009 decision from the Southern District of New York, *Knox v. Agria Corp.*¹⁷

The second recurring error courts make in deciding the proper jurisdiction for these cases is when they ask whether state courts are competent to hear class actions brought under the Securities Act, but reach the wrong answer and hold that they are. This error has arisen in a line of authority headed by a 2011 decision from a California state appeals court, *Luther v. Countrywide Financial Corp.*,¹⁸ which disputes the reasoning used by the court in *Knox*. This conflict, over an issue as fundamental as subject-matter jurisdiction, presents a serious concern. A state court that proceeds to hear and adjudicate a federal action over which it has no subject-matter jurisdiction is acting *ultra vires*. Because subject-matter jurisdiction cannot be conferred even by the consent of the parties, any judgment on the merits is subject to reversal (either on direct appeal or, later, in an action to enforce a judgment). Further, any settlement is subject to collateral attack. Beyond just the waste of judicial and party resources that proceeding before a court lacking subject-matter jurisdiction can produce, the inconsistent patch-work of decisions fundamentally undermines the goals animating the PSLRA and SLUSA: consistent federal adjudication of class actions asserting claims arising under the federal securities laws.

This Article maintains that this conflict between the *Knox* and *Luther* lines of cases is illusory. SLUSA’s Jurisdictional Amendment clearly divests state courts of subject-matter jurisdiction over some category of class actions alleging Securities Act claims. The *Luther* line of cases

14. The Jurisdictional Amendment is separate and distinct from the new rights of removal SLUSA created in Section 16(c) of the Securities Act, which were enacted by a separate section of SLUSA, Section 101(a)(1). *See infra* Part VI.

15. *See infra* Part III.B.

16. *See infra* Parts III.A-B.

17. 613 F. Supp. 2d 419 (S.D.N.Y. 2009).

18. 125 Cal. Rptr. 3d 716 (Ct. App. 2d Dist. 2011).

disagree — but if SLUSA’s Jurisdictional Amendment does not divest state courts of subject-matter jurisdiction over Exclusively Federal Securities Class Actions, what does it do? *Luther*, quite notably, fails to answer this question at all. Its progeny attempt to do so by arguing that the Jurisdictional Amendment eliminates state court jurisdiction over class actions that allege Securities Act claims if they also allege pendent *state* law claims. This theory, however, cannot be squared with *Kircher v. Putnam Funds Trust*,¹⁹ in which the Supreme Court expressly held that, post-SLUSA, state courts *retain* jurisdiction over actions asserting securities-based state law claims.²⁰ This leaves only one valid interpretation of SLUSA’s Jurisdictional Amendment — it eliminates state court jurisdiction over class actions asserting Securities Act claims, i.e., Exclusively Federal Securities Class Actions. Further, this textual reading is also the only one consistent with SLUSA’s legislative purpose and federalism precepts.

Part I of this Article begins by examining the history of the Securities Act, the PSLRA, SLUSA and the background of Securities Act claims and class actions leading up to SLUSA’s amendments. Part II engages in a review and analysis of SLUSA’s statutory text and the revisions it made to the Securities Act. Part III looks specifically at SLUSA’s Jurisdictional Amendment and its effects on the jurisdictional provision of the Securities Act and explains how it divests state courts of subject-matter jurisdiction over Exclusively Federal Securities Class Actions, before turning to an examination of the legal errors made by *Luther* and its progeny in reaching their contrary conclusions. Parts IV and V explain how SLUSA’s legislative history and purpose and the precepts of federalism further compel the conclusion that Exclusively Federal Securities Class Actions should proceed only before federal courts. Finally, Part VI examines the current confused state of the case law caused by courts that have overlooked or ignored SLUSA’s Jurisdictional Amendment and focused on the “wrong” question — the removal provision of Section 16(c) of the Securities Act — and explains how a proper focus by courts on the threshold jurisdictional issues presented by the Jurisdictional Amendment can untangle the conflicts in the case law going forward.

19. 547 U.S. 633 (2006).

20. See *infra* Part III.C.3.

I. A BRIEF HISTORY OF THE SECURITIES ACT, THE PSLRA AND SLUSA

A. *The Securities Act of 1933*

As originally drafted following the Great Depression, the Securities Act allowed plaintiffs a near-absolute right to choose their preferred forum as between federal and state court. That jurisdiction was conferred through two separate provisions. The first sentence of Section 22(a)²¹ (the Securities Act's "Jurisdictional Provision") vested subject-matter jurisdiction over Securities Act claims concurrently in federal and state courts.²² The general right of "federal question" removal set forth in title 28, section 1441(a) would normally allow defendants in actions alleging federal Securities Act claims but brought in state court to remove such actions to federal court.²³ The penultimate sentence of Section 22(a) of the Securities Act, however, instituted a "Removal Bar" to carve out certain actions alleging Securities Act claims from the general "federal question" right of removal.²⁴

21. Section 22 of the Securities Act is codified at 15 U.S.C. § 77v. Citations by authorities to "Section 22" or to "Section 77v" refer to this same section.

22. Securities Act of 1933, Pub. L. No. 73-22, § 22, 48 Stat. 74, 86; *see also* 15 U.S.C. § 77v(a) (1987) ("The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.") (amended 1998).

23. 28 U.S.C. § 1331 provides that federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," and 28 U.S.C. § 1441(a) provides that,

[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

24. Securities Act of 1933, Pub. L. No. 73-22, § 22, 48 Stat. 74, 87; *see also* 15 U.S.C. § 77v(a) (1987) (amended 1998). There is little if any legislative history explaining why Congress saw fit to vest jurisdiction for federal Securities Act claims concurrently in federal and state courts, or why it sought to impose a Removal Bar preventing cases brought in state court from being removed to federal court. *See* Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. UNIV. L. REV. 621, 632-33 (2006). Courts and commentators have recognized that these provisions were intended to serve as plaintiff-friendly measures and allow plaintiffs an absolute right to the forum of their choice, over any objections by defendants. *See* *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768 (1st Cir. 2011) ("Civil suits asserting claims under the Securities Act are within the 'arising under' clause of Article III and can easily be brought as original actions in federal court. 15 U.S.C. § 77v(a). Although expressed as a bar on removal of such cases from state court, section 22(a)'s aim is not to preclude hearing such cases in federal court but instead to

The Removal Bar is not absolute. It provides that “[n]o case arising under [the Securities Act] and brought in any State court of *competent jurisdiction* shall be removed to any court of the United States.”²⁵ By its plain terms, the Removal Bar does not apply to cases arising under the Securities Act that are brought in a state court that *lacks* competent jurisdiction. The Removal Bar’s jurisdictional limitation was an academic point in the sixty years between the enactment of the Securities Act and the enactment of the PSLRA and SLUSA, however, because situations in which an action alleging Securities Act claims might be brought in a state court that lacked jurisdiction came up rarely if ever. In part, this was because the Securities Act’s original Jurisdictional Provision vested subject-matter jurisdiction over actions alleging Securities Act claims concurrently in federal and state courts, and hence state courts of general jurisdiction were courts “of competent jurisdiction” for the purposes of the Removal Bar²⁶ — but also significant was the fact that economically significant securities actions were generally not filed in state court to begin with, and hence the question of state courts’ jurisdictional competence tended not to arise in the first place. Rather, “the plaintiffs’ bar had apparently concluded that the best place to litigate their cases was in the federal courts. Although in theory a state court remedy might also have been pursued, in fact state court remedies were left largely unnoticed by the plaintiffs’ bar for the more than sixty years.”²⁷

‘favor plaintiffs’ choice of forum.’” (quoting *Pinto v. Maremont Corp.*, 326 F. Supp. 165, 167 n.2 (S.D.N.Y. 1971)) (internal brackets omitted); *see also* Cook, *supra*, at 634. Commentators have offered several additional theories as to why Congress made Securities Act claims non-removable, including recognizing a “complementary, historic interacting federal-state relationship[,] reducing the burdens on federal courts, preserving a plaintiff’s choice of forum and preventing the ‘federalization’ of traditional areas of state law.” Cook, *supra*, at 633-34.

25. Securities Act of 1933, Pub. L. No. 73-22, § 22, 48 Stat. 74, 87 (emphasis added); *see also* 15 U.S.C. § 77v(a) (1987) (amended 1998).

26. States can and do impose their own limits on jurisdiction on certain courts (e.g., small claims court), so it was possible even before SLUSA for an action alleging Securities Act claims to be brought in a state court that lacked competent jurisdiction — but it would be a rare case indeed where a plaintiff would make such an obvious mistake rather than filing its claim in a state court with more general jurisdiction.

27. *The Securities Litigation Uniform Standards Act of 1997: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 47 (1998) [hereinafter *H. Subcomm. SLUSA Hearing*] (statement of David L. Anderson, Pillsbury Madison & Sutro LLP); *see also The Securities Litigation Uniform Standards Act of 1997 — S. 1260: Hearing before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 70 (1998) [hereinafter *S. Subcomm. 1998 SLUSA Hearing*] (statement of John F. Olson, Gibson, Dunn & Crutcher) (“[s]tate court class actions involving nationally traded securities were virtually unknown prior to the PSLRA”); H.R. REP. NO. 105-640, at 10 (1998); S. REP. NO. 105-182, at 3-4 (1998).

B. The PSLRA, the “Unintended Consequence” of Securities Class Actions Shifting to State Court, and SLUSA’s Remedy Thereof

Plaintiffs’ preference for filing securities class actions in federal court changed sharply and radically, however, following the 1995 passage of the PSLRA.

The PSLRA was enacted in response to perceived securities litigation abuses, particularly suits brought as class actions.²⁸ Congress recognized the potential for abuse in “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regarding to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action” that “target[] deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability” — so-called “strike suits” — and “abuse . . . the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle.”²⁹ The PSLRA was designed to combat these abuses by instituting numerous reforms: among them, limiting recoverable damages and attorneys’ fees, providing a “safe harbor” for forward-looking statements, imposing new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandating the imposition of sanctions for frivolous litigation, and authorizing an automatic stay of discovery pending the resolution of any motion to dismiss.³⁰

28. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (“[T]he House Conference Report accompanying what would later be enacted as the Private Securities Litigation Reform Act of 1995 . . . identified ways in which the class-action device was being used to injure ‘the entire U.S. economy.’ According to the Report, nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and ‘manipulation by class action lawyers of the clients whom they purportedly represent’ had become rampant in recent years. . . . [The PSLRA] represents Congress’ effort to curb these perceived abuses.”) (citations omitted). As commentators have noted, Congress had not anticipated anything like the current system of securities class actions when it first promulgated the Securities Act in 1933. See, e.g., Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 283-84 (1998) (“Nor is it likely that Congress anticipated anything like the current state of private securities litigation. The class action device did not exist until Congress passed the Federal Rules of Civil Procedure in 1938. Modern class action litigation and the rise in securities fraud class actions had to await the SEC’s support of private securities law enforcement in the early to mid-1960s and the liberalization of Rule 23 in 1966.”).

29. H.R. CONF. REP. NO. 104-369, 31 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 730; see also *Dabit*, 547 U.S. at 81 (“Proponents of the [PSLRA] argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers’ future prospects, and deterred qualified individuals from serving on boards of directors.”).

30. See 15 U.S.C. §§ 77z-1, 77z-2 (the PSLRA’s amendments to the Securities Act);

Some of the PSLRA's protections apply to any action alleging claims under the federal securities laws, whether brought as a class action or an individual action and whether brought in federal or state court.³¹ Other PSLRA reforms are specifically directed to class actions.³² For this latter category, however, the wording of the PSLRA is such that the reforms might only apply to class actions brought in federal court.³³ For example, one chief concern driving the promulgation of the PSLRA was the proliferation of "lawyer-driven lawsuits" and the practice of "plaintiffs' lawyers 'rac[ing] to the courthouse' to be the first to file a securities class action complaint," often filed in the name of a "professional plaintiff" with little actual financial stake in the litigation, in order to win designation as counsel for the class³⁴ — and the attendant counsel fees from any settlement³⁵ — following which the plaintiffs' lawyers would pay their

15 U.S.C. §§ 78u-4, 78u-5 (the PSLRA's amendments to the Securities Exchange Act of 1934 (the "Exchange Act")); *see also Dabit*, 547 U.S. at 81. For a fuller description of the changes that the PSLRA effected to the federal securities laws, *see*, for example, THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF SECURITIES REGULATION § 7.17 (2014) (re Securities Act); *id.* § 12.15 (re Exchange Act).

31. *See* 15 U.S.C. §§ 77z-1(b)-(d), 77z-2 ("In *any* private action arising under this subchapter . . .") (emphasis added); *see also* *Credit Suisse First Boston Corp. v. ARM Fin. Grp., Inc.*, No. 99 CIV 12046 WHP, 2001 WL 300733, at *4, 2001 U.S. Dist. LEXIS 3332, at *12-13 (S.D.N.Y. Mar. 28, 2001). For example, the PSLRA's automatic stay of discovery while a motion to dismiss is pending applies to Securities Act claims brought in state court as well as federal court. *See* *Milano v. Auhll*, No. SB 213 476, 1996 WL 33398997, at *2-3 (Cal. App. Dep't Super. Ct. Oct. 2, 1996) ("It appears to this court that Congress intended the provisions creating a new right on the part of defendants, to put plaintiffs to the burden of pleading and offering to prove specific allegations under the 1933 Act, and to a stay of discovery until plaintiffs meet the burden, to be applied to all cases in state as well as federal courts if at least one cause of action is within these amendments."); *Shores v. Cinergi Pictures Entm't Inc.*, No. BC149861, Notice of Ruling 2 (Cal. Super. Ct. L.A. Cnty. Sept. 5, 1996) ("[T]he automatic stay provision in Section 27(b) of the Securities Act applies to all cases filed under the Securities Act, whether in state or federal court.").

32. *See* 15 U.S.C. § 77z-1(a)(1) ("The 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.").

33. *See, e.g.,* *Fed. Deposit Ins. Corp. v. Banc of Am. Sec. LLC (In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.)*, 934 F. Supp. 2d 1219, 1231-33 (C.D. Cal. 2013) (holding that class actions in state court are not subject to the requirements set out in 15 U.S.C. § 77z-1(a)(1) because "[t]he provisions of th[at] 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).

34. H.R. CONF. REP. NO. 104-369, at 32-34, *reprinted in* 1995 U.S.C.C.A.N. at 731-33; *accord* S. REP. NO. 104-98, at 9-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 688-90.

35. *See, e.g., In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 149 & n.4 (D. Del. 2005) (describing the appointment of lead plaintiff as a determination of "which of the plaintiffs' law firms will win the money race. . . . It is the lead counsel who stands to gain, not the lead plaintiff. . . . [S]ecurities lawyers are involved, lawyers who are vying for the chance to take the laboring oar in litigation and the monetary rewards that go with it.").

“professional plaintiffs” a “‘bonus’ far in excess of their share of any recovery.”³⁶ To combat this practice, the PSLRA included a number of class action reforms, including requirements that would-be lead plaintiffs filing a class action file sworn certifications establishing their bona fides³⁷ and publish a notice advising other potential class members of the existence of the action and that other potential class members can move to replace the original filer as lead plaintiff, with a statutory preference for the member with the largest financial stake,³⁸ prohibiting lead plaintiffs from receiving “bonuses” in excess of the recovery of the rest of the class,³⁹ and barring plaintiffs’ lawyers from receiving more than a “reasonable percentage” of the class’s actual recovery.⁴⁰ But class actions filed in state court might not be subject to these provisions “and so are more likely to permit such abuse[s]” to continue.⁴¹

36. See S. REP. NO. 104-98, at 10, *reprinted in* 1995 U.S.C.C.A.N. at 689.

37. 15 U.S.C. § 77z-1(a)(2).

38. *Id.* § 77z-1(a)(3).

39. *Id.* § 77z-1(a)(4).

40. *Id.* § 77z-1(a)(6).

41. See, e.g., *Fed. Deposit Ins. Corp. v. Banc of Am. Sec. LLC (In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.)*, 934 F. Supp. 2d 1219, 1233 (C.D. Cal. 2013). In many instances, the Exclusively Federal Securities Class Actions being filed in state court are parallel suits brought by plaintiffs with little actual financial stake that assert substantially the same claims as class actions brought in federal court brought by institutional plaintiffs with large actual financial interests. See, e.g., *In re King Pharm.*, 230 F.R.D. 503, 505 (E.D. Tenn. 2004) (“[I]f the Court were to remand the movants’ class actions, there would be concurrent class actions in state and federal court asserting substantially similar claims. This could lead to considerable confusion if not outright inconsistent results.”). For example, the plaintiff that brought the state court class action in *Brady v. Kosmos Energy Ltd.*, No. DC-12-00251-C (Tex. Dist. Ct. Dallas Cnty.) could only assert \$1908 in damages, as compared to the eventual lead plaintiff of the consolidated federal class action, and its \$717,659 in asserted damages. See *In re Kosmos Energy Ltd. Sec. Litig.*, No. 3:12-CV-373-B, 2012 WL 6199318, at *2 (N.D. Tex. Nov. 1, 2012) (listing and comparing state plaintiff’s alleged damages with eventual federal lead plaintiff’s, and appointing the latter as lead plaintiff pursuant to the PSLRA due to its larger actual financial stake). Similarly, the plaintiff that brought the state court class action in *Rubin v. Pixelplus Co., Ltd.*, No. 16242/2006 (N.Y. Sup. Ct. Kings Cnty.), could only assert that he purchased 500 shares of the defendant company, as compared to the eventual lead plaintiff of the consolidated federal class action, and its purchase of 116,100 shares. Compare Certification of Plaintiff [Michael Rubin] ¶ 4, *West End Capital Mgmt., LLC v. Lee*, No. 1:06-cv-02951-TPG (S.D.N.Y. June 16, 2006), ECF No. 4-2 (listing state plaintiff’s alleged damages), with Certification [of Plaintiff West End Capital Management, LLC] in Support of Application for Lead Plaintiffs sched., *West End Capital Mgmt., LLC v. Lee*, No. 1:06-cv-02951-TPG (S.D.N.Y. Apr. 25, 2006), ECF No. 19-2 (listing eventual federal lead plaintiff’s alleged damages). These small-stake plaintiffs could never qualify under the PSLRA for lead plaintiff status of a consolidated federal action; in state court, however, where these PSLRA reforms and the consolidation rules of the Federal Rules of Civil Procedure are unavailable, these minor plaintiffs can bring a duplicative strike suit in the hopes of extracting an additional settlement.

As a result, the PSLRA had an “unintended consequence”⁴²: to avoid these PSLRA requirements, securities class action plaintiffs, who had previously brought their actions in federal court, began a dramatic shift towards bringing them in state court.⁴³ As Congress found:

Prior to the passage of the [PSLRA], there was essentially no significant securities class action litigation brought in State court. . . . [S]ince passage of the [PSLRA], plaintiffs’ lawyers have sought to circumvent the [PSLRA]’s provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA]’s procedural or substantive protections against abusive suits are available.⁴⁴

As one of the principal co-sponsors of SLUSA frankly stated, “I think if we had ever anticipated that there would be a shift to State courts that we would have had language in the [PSLRA] to address this. We simply didn’t think of it at the time.”⁴⁵

42. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

43. See *id.* at 82.

44. H.R. REP. NO. 105-640, at 10 (1998); see S. REP. NO. 105-182, at 3-4 (1998) (“Former SEC Commissioner Joseph Grundfest summarized this post [PSLRA] increase in state securities class actions in testimony co-authored with his fellow Stanford Law School faculty member Michael Perino: [‘]The relative stability of the aggregate litigation rate masks a significant shift of activity from federal to state court * * *. There is widespread agreement that these figures represent a substantial increase in state court litigation. Two phenomena seem to explain the bulk of this shift. First, there appears to be a ‘substitution effect’ whereby plaintiff’s counsel file state court complaints when the underlying facts appear not to satisfy new, more stringent federal pleading requirements, or otherwise seek to avoid the substantive or procedural provisions of the Act. Second plaintiffs appear to be resorting to increased parallel state and federal litigation in an effort to avoid federal discovery stays or to establish alternative state court venues for settlement of federal claims.[’] While there was some disagreement as to the exact size of the increase in state class-action filings, the overall evidence received by the Committee is compelling. As one witness testified ‘(t)he single fact is that state-court class actions involving nationally traded securities were virtually unknown prior to the [PSLRA]; they are brought with some frequency now.’”); *Dabit*, 547 U.S. at 82; see also Perino, *supra* note 28, at 308-09 (“The data . . . suggest that the increase in state court actions is largely driven by a shift in the number of publicly traded issuers sued in state court since the [PSLRA]. . . . In the sample of 1992-1994 state class actions, only six involved publicly traded issuers. By contrast, in only the first eighteen months under the Reform Act, the vast majority of state court class actions, seventy-seven in all, involved publicly traded securities. The timing of this sudden upswing in state court filings supports the inference that the shift in forum selection was driven by the passage of the [PSLRA].”).

45. *Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs to Amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to Limit the Conduct of Securities Class Actions Under State Law, and for Other Purposes*,

In 1997, Senators Phil Gramm and Chris Dodd, respectively the Chairman and Ranking Member of the Senate Subcommittee on Securities, jointly introduced a bill designed to close this “loophole [that] was being exploited” and ensure that national securities class actions would have to be filed only in federal court and be subject to federal standards, including the PSLRA.⁴⁶ Following a year of hearings, congressional debate and revisions to the bill, Congress moved forward to stem the “shift[] from Federal to State courts” and “prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]”⁴⁷ by enacting the Securities Litigation Uniform Standards Act of 1998.

II. A TEXTUAL EXAMINATION OF SLUSA’S AMENDMENTS TO THE SECURITIES ACT

A. *SLUSA’s Jurisdictional Amendment*

SLUSA combatted two shifts prompted by the PSLRA. First, SLUSA precluded the assertion in class actions of state law claims that overlapped with private remedies available under the Securities Act (and the Securities Exchange Act of 1934).⁴⁸ Second, SLUSA’s Jurisdictional Amendment eliminated the subject-matter jurisdiction of state courts to hear certain Securities Act class actions. Whereas the Securities Act’s Jurisdictional Provision had originally vested concurrent jurisdiction over actions alleging Securities Act claims in both federal and state courts, SLUSA’s Jurisdictional Amendment revised it to instead read:

105th Cong. 8 (1997) [hereinafter *S. Subcomm. 1997 SLUSA Hearing*] (statement of Rep. Anna Eshoo).

46. See S. 1260, 105th Cong. (2d Sess. 1997); *S. Subcomm. 1997 SLUSA Hearing*, *supra* note 45, at 2 (opening statement of Sen. Phil Gramm, Chairman, Subcomm. on Sec. of S. Comm. on Banking, Hous. & Urban Affairs) (“We held a hearing earlier this year to take a look at how the [PSLRA] was being received and how it was working. We discovered from that hearing that a new loophole was being exploited, that what was occurring is that there has been a shift of these lawsuits into State courts. So Senator Dodd and I thought about this, looked at it, and decided to introduce a bill that basically says that for class action suits, and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly an overriding national interest, that those suits have to be filed in Federal court.”).

47. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(2), (5), 112 Stat. 3227, 3227; see *Dabit*, 547 U.S. at 82.

48. See *infra* Parts II.C.2-3. SLUSA made several exceptions not relevant here for certain specific state law claims, such as claims based on the law of the state in which the issuer is incorporated. 15 U.S.C. §§ 77p(d), 78bb(f)(3); see also *infra* Part II.C.4.

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, *except as provided in section 77p of this title* [Section 16 of the Securities Act] *with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.⁴⁹

“When Congress acts to amend a statute, . . . it intends its amendment to have real and substantial effect.”⁵⁰ The Jurisdictional Amendment altered the Jurisdictional Provision — and the effect of this amendment, by its plain terms, was to eliminate state court jurisdiction over some category of actions over which state courts previously had jurisdiction concurrent with federal courts.⁵¹

The Jurisdictional Amendment does not itself precisely define this excluded category. It provides that state courts have concurrent jurisdiction over actions alleging Securities Act claims “except as provided in [Section 16] with respect to covered class actions”⁵² — but “covered class action” is a term undefined in either SLUSA’s Jurisdictional Amendment or in the Securities Act’s Jurisdictional Provision that SLUSA amends.⁵³ It is defined in Section 16 of the Securities Act, as amended by SLUSA — specifically Section 16(f), a subsection entitled “Definitions,” where all of SLUSA’s defined terms are located.⁵⁴

49. 15 U.S.C. § 77v(a) (language added by SLUSA’s Jurisdictional Amendment emphasized).

50. *Stone v. INS*, 514 U.S. 386, 397 (1995) (citing *Moskal v. United States*, 498 U.S. 103, 109-11 (1990); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

51. *See generally* *McIntosh v. Partridge*, 540 F.3d 315, 321 (5th Cir. 2008) (holding that where a statute that formerly allowed individuals to bring an action in federal court was “replaced . . . with a provision that only mentions the ability of individuals to bring claims . . . in state court,” courts must respect and enforce this divestiture of jurisdiction, as “[i]f [a court] were to hold that the removal of the statutory language authorizing federal jurisdiction for these suits did not actually remove federal jurisdiction, [it] would be violating a basic tenant of statutory construction: when Congress amends a law the amendment is made to effect some purpose”) (citations and internal quotation marks omitted).

52. 15 U.S.C. § 77v.

53. *See id.*

54. *Id.* § 77p(f).

B. SLUSA's Definitions as Provided in Section 16 of the Securities Act

“Covered class action” is a specialized “term of art.”⁵⁵ Unique to SLUSA, it does not just refer to “class actions,” as the term is commonly understood and used in other aspects of federal law.⁵⁶ While “covered class actions” include traditional class actions,⁵⁷ it also expands “class actions” in a non-standard manner to cover a broader range of actions. This includes certain actions seeking damages for fifty or more parties and groups of separately-filed actions joined or consolidated and pending in the same court.⁵⁸ In doing so, Section 16 defines SLUSA’s overall reach, not just with respect to the Jurisdictional Amendment, but with respect to SLUSA’s other reforms as well.⁵⁹

This definition of “covered class action” applies to all of Section 16.⁶⁰ But there is nothing in Section 16 making the definition applicable to any other section of the Securities Act, such as the Jurisdictional Provision, which is located in Section 22(a).⁶¹ In amending the Securities Act’s Jurisdictional Provision, had SLUSA’s Jurisdictional Amendment simply used the term “covered class action” without more, the term would have been undefined.⁶² The cross-reference to Section 16 provided by SLUSA’s Jurisdictional Amendment bridges that gap.

The split between the *Knox* and *Luther* lines of precedent arises from the language used in the cross-reference: specifically, the fact that it says

55. See *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 424 (S.D.N.Y. 2009).

56. Compare FED. R. CIV. P. 23 (describing class actions), with 15 U.S.C. § 77p(f)(2) (describing “covered class actions” as defined under SLUSA).

57. 15 U.S.C. § 77p(f)(2)(A)(i)(II).

58. *Id.* §§ 77p(f)(2)(A)(i)(I), (ii).

59. Congress was concerned that limiting SLUSA’s reforms to “true” class actions as defined in Federal Rule of Civil Procedure 23 would be overly restrictive and allow plaintiffs “a loophole to bring a single suit that names many plaintiffs” while avoiding the specific requirements set out in Rule 23, in order to keep their actions outside the reach of SLUSA. See S. REP. NO. 105-182, at 7 (1998). As a result, Congress defined the term of art “covered class action” to expand beyond “true” class actions to cover these other actions if they sought damages for more than fifty parties. See *id.*

60. 15 U.S.C. § 77p(f).

61. *Id.* (“For purposes of *this* section, the following definitions shall apply . . .”) (emphasis added); see, e.g., *Vt. Agency of Nat’l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783-84 (2000) (definition in one section of statute that “contains a provision expressly defining [term] ‘for purposes of this section’” suggests that definition does not apply to other sections of statute) (internal brackets omitted); *In re Princo Corp.*, 486 F.3d 1365, 1368 (Fed. Cir. 2007) (“Even when the definition appears in a single statute, . . . definitions limited to one section should not be applied to another section.”) (citations omitted).

62. The term “covered class action” is only used in Section 16 itself, and in the Jurisdictional Provision in conjunction with explicit cross-references to Section 16; the term is never used anywhere in the Securities Act without an express reference to Section 16.

“except as provided in [Section 16] with respect to covered class actions”⁶³ (instead of, for example, “except with respect to covered class actions *as defined in Section 16*”). The *Knox* line maintains that the cross-reference is to the definition of “covered class action” in Section 16⁶⁴; the *Luther* line maintains that it is intended to place an *additional* substantive limitation on the Jurisdictional Amendment, such that only actions that are covered class actions *and* that satisfy some other set of conditions set out in Section 16 are excluded from state court jurisdiction.⁶⁵

Before addressing the lines of reasoning in *Knox* and *Luther*, respectively, it is worth briefly examining the five other subsections that comprise Section 16 to see what alternatives there are, if any, for what this other substantive limitation could be.

C. The Other Provisions in Section 16 of the Securities Act

Prior to the enactment of SLUSA, Section 16 of the Securities Act simply read, “The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.”⁶⁶ SLUSA § 101(a)(1) wholly redrafted this section, however, replacing the old provision with six new subsections that established many of SLUSA’s core reforms.

1. Section 16(a) – General Reservation of Rights

The new Section 16(a) retains the reservation of rights language of the old Section 16, stating that the remedies provided by the Securities Act are non-exclusive and that other remedies that might exist with respect to securities fraud are preserved, except with respect to those remedies that are precluded in Section 16(b).⁶⁷ This subsection does not use or depend upon the term “covered class action.”

2. Section 16(b) – Preclusion

Section 16(b), one of SLUSA’s “core” provisions,⁶⁸ precludes plaintiffs from maintaining class actions involving nationally traded securities that plead certain state law claims.

63. 15 U.S.C. § 77v(a) (emphasis added).

64. See *infra* Part III.B.

65. See *infra* Part III.C.

66. 15 U.S.C. § 77p (1933) (amended 1998).

67. *Id.* § 77v(a).

68. See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).

One of the chief concerns raised before Congress that prompted SLUSA's enactment was the threat that national securities issuers were potentially subject to suit in any state court pursuant to any state's laws, subjecting national issuers to a patchwork of fifty different legislative regimes.⁶⁹ To stymie this, SLUSA promulgated a new Section 16(b) of the Securities Act, which precludes class actions from alleging certain state law claims with respect to nationally traded securities. Specifically, Section 16(b) provides:

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —

- (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
- (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.⁷⁰

69. See *S. Subcomm. 1997 SLUSA Hearing, supra* note 45, at 29, 83 (statement of Daniel Cooperman, Senior Vice President, General Counsel, and Secretary, Oracle Corp., on behalf of the Software Publishers Association) (“The question before us in evaluating the Uniform Standards Act is whether the predictability and stability of our capital markets is being undermined by a patchwork of duplicative and, in some cases, inconsistent State laws . . . [I]n our view it is bad law, bad policy, and bad economics to . . . provid[e] plaintiffs with alternatives to circumvent the Federal initiative.”) (emphasis in original); *id.* at 33 (statement of Michael A. Perino, Lecturer at Stanford Law School and Co-Director of the Law School’s Roberts Program in Law, Business, and Corporate Governance) (“[H]aving a patchwork quilt of different rules that apply to different customers in different States makes no sense at all.”); see also Perino, *supra* note 28, at 316-17 (“Allowing individual states to assert jurisdiction over transactions in national markets also imposes significant costs on companies that do business in more than one state or who have a significant corporate presence in multiple states. If state law causes of action are permitted, such companies could be exposed to litigation in multiple states under multiple procedural and substantive standards. Even if litigation could be confined to one forum, enormously complicated choice of law questions will likely arise regarding the application of different states’ laws to different members of the class. A court may have to apply as many as fifty different substantive legal standards to members of the class. The resulting confusion and complexity could replicate many of the management problems that pervade mass tort and other kinds of class actions based on state law.”); *cf.* Guice v. Charles Schwab & Co., Inc., 674 N.E.2d 282, 290 (N.Y. 1996) (noting that Congress may preempt state statutory and common law causes of action in the securities context where “[s]ecurities [participants], confronted with the risk of nationwide class action civil damage liability . . . would be impelled to tailor their disclosures to each State’s common-law . . . jurisprudence, and the carefully crafted [federal] disclosure requirements would have little, if any, influence”) (footnote omitted).

70. 15 U.S.C. § 77p(b). A “covered security,” generally speaking, is a security listed and traded on a national securities exchange. *Id.* §§ 77p(f)(3), 77r(b); see Chadbourne &

Section 16(b) “does not . . . displace state law with federal law” or interfere with any plaintiff’s right to bring state law claims individually; it only precludes plaintiffs from seeking to use the *class action device* to enforce such claims (or to bring such claims on behalf of more than fifty plaintiffs).⁷¹ Pursuant to Section 16(b), such state law claims cannot be maintained in class actions in *any* court, federal or state, and are subject to dismissal.⁷² In other words, following SLUSA, the only claims that can be brought using the class action device alleging misrepresentations or omissions with respect to nationally traded securities are claims under the federal securities laws — if plaintiffs want to bring a class action, they must seek federal remedies and comply with federal standards.⁷³

3. Section 16(c) – Removal

In addition to the concerns about subjecting national securities issuers to a patchwork of fifty different state laws, Congress was also concerned about subjecting issuers to class action suits in state *courts*, in which many of the protections of the PSLRA are unavailable.⁷⁴ Prior to SLUSA, it was relatively easy for plaintiffs to bring economically significant class actions against national securities issuers in state courts and to prevent them from being removable to federal court.⁷⁵ To remedy this, Congress enacted

Parke LLP v. Troice, 134 S. Ct. 1058, 1064 (2014); *Dabit*, 547 U.S. at 83. Thus, Section 16(b) embraces both traditional fraud claims involving securities analogous to the implied private right of action under Section 10(b) of the Exchange Act, and non-fraud-based claims alleging misstatements or omissions in the purchase or sale of a security analogous to claims under Sections 11 and 12(a)(2) of the Securities Act.

71. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) (“The preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court.” (citing *Dabit*, 547 U.S. at 87-88)).

72. *Id.* See generally Troice, 134 S. Ct. at 1064 (stating if SLUSA preclusion does not apply, “the plaintiffs may maintain their state-law-based class actions, and they may do so either in federal or state court. Otherwise, their class actions are precluded altogether.”).

73. See *Dabit*, 547 U.S. at 87-88.

74. See *supra* Part I.B.

75. See, e.g., *Kircher*, 547 U.S. at 637, 641-42 & n.10 (involving covered class actions relating to covered securities brought by plaintiffs alleging only state law claims that were not subject to diversity jurisdiction and consequently, absent SLUSA, could not be removed to federal court). At the time of SLUSA’s enactment, defendants were barred from removing class actions that lacked a “well-pleaded” federal claim if even a single named plaintiff was a citizen of the same state as any defendant or if the action was brought in a state of which any defendant was a citizen, see 28 U.S.C. § 1332 (1996) (amended 2005); 28 U.S.C. § 1441(b)(2), giving plaintiffs numerous means of preventing defendants from removing even economically significant securities class actions relating to nationally traded securities to federal court. See, e.g., Cook, *supra* note 24, at 642-43 (“One noted maneuver

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Section 16(c), which granted defendants new rights of removal. Specifically, Section 16(c) provides:

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.⁷⁶

Section 16(c), in effect, expands the scope of federal question jurisdiction to include covered class actions involving nationally traded securities for which there would otherwise be no federal subject-matter jurisdiction (e.g., covered class actions between non-diverse parties that allege only state law claims) and grants a new vehicle for removing these actions to federal court.⁷⁷ Section 16(c) does not alter jurisdiction or removal with respect to covered class actions that *already* present a federal question, i.e., class actions that allege a claim under the federal securities laws; it simply *extends* rights of removal (and, implicitly, jurisdiction) over a new class of covered class actions.⁷⁸

4. Section 16(d) – Preservation of Certain State Law Claims

Section 16(d) excludes from Section 16(b)'s scope certain state law claims based on the law of the state in which the issuer is incorporated, and

was preventing removal of class actions by bringing only state law claims and artfully pleading around the requirements of diversity jurisdiction. That is, plaintiffs' lawyers would name parties of certain state citizenship to destroy complete diversity and/or seek less than the requisite amount-in-controversy for any one plaintiff in order to remain in state court.") (citations omitted). Section 16(c) was hence needed to provide increased removal rights to defendants. Seven years later, Congress further increased defendants' right to remove economically significant class actions from state court to federal court when it enacted the Class Action Fairness Act of 2005. *See* Class Action Fairness Act of 2005, Pub. L. 109-2, §§ 4-5, 119 Stat. 4, 9-13 (expanding federal diversity jurisdiction and removal procedures for large class actions).

76. 15 U.S.C. § 77p(c).

77. *See, e.g.,* Rowinski v. Salomon Smith Barney Inc., 398 F.3d 294, 298 (3d Cir. 2005) ("The SLUSA removal provision . . . confer[s] federal removal jurisdiction over a unique class of state law claims." (citing Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003))); Winne v. Equitable Life Assur. Soc'y, 315 F. Supp. 2d 404, 409 (S.D.N.Y. 2003) (actions that do not present federal questions or diversity jurisdiction normally not removable from state court to federal court are removable where "Congress has expressly provided that a state-law claim be removed to federal court, as it did in SLUSA") (citations omitted).

78. 15 U.S.C. § 77p(c).

certain actions brought by states, subdivisions thereof or state pension plans.⁷⁹

5. Section 16(e) – Preservation of State Enforcement Actions

Section 16(e) preserves the right of state securities regulators to investigate securities fraud and bring state enforcement actions.⁸⁰ This subsection never uses or depends upon the term “covered class action.”

6. Section 16(f) – Definitions

Section 16(f) sets forth all of SLUSA’s defined terms, including the definition of “covered class action.”⁸¹

III. UNDERSTANDING SLUSA’S JURISDICTIONAL AMENDMENT AND ITS CROSS-REFERENCE TO SECTION 16

A. Early Interpretation of the Effect of SLUSA’s Jurisdictional Amendment

It was several years following SLUSA’s enactment before courts began to examine SLUSA’s Jurisdictional Amendment and its revision to the Securities Act’s Jurisdictional Provision.⁸² At the outset, those courts that did examine the Jurisdictional Amendment uniformly held that it divested state courts of concurrent jurisdiction over all “covered class actions” alleging federal Securities Act claims, i.e., they implicitly understood that the Jurisdictional Amendment’s cross-reference to Section 16 was to the definition of “covered class action” in Section 16, as opposed to an additional substantive limitation on the Jurisdictional Amendment’s scope.

One of the first of these early decisions held that “[o]riginally, the Securities Act of 1933 did provide that state and federal courts had concurrent jurisdiction over claims brought under the Act” but that the Securities Act as amended by the Jurisdictional Amendment did *not* grant concurrent state and federal jurisdiction over all Securities Act claims.⁸³ A

79. *Id.* § 77p(d).

80. *Id.* § 77p(e).

81. *See supra* Part II.B.

82. A number of courts addressing the proper treatment of Exclusively Federal Securities Class Actions brought in state court initially tended to erroneously focus solely on Section 16(c) and the separate SLUSA § 101(a)(3)(B). *See infra* Part VI.

83. *Kulinski v. Am. Elec. Power Co., Inc.*, No. C-2-03-412, 2003 WL 24032299, at *1-3, 2003 U.S. Dist. LEXIS 26447, at *5-9 (S.D. Ohio Sept. 19, 2003) (report and

subsequent opinion similarly held that “SLUSA amended [Section 22](a) to divest state courts of concurrent jurisdiction over covered class actions”⁸⁴ And, three years later, a trio of decisions each in turn held that Congress, by enacting SLUSA, eliminated concurrent state court jurisdiction for covered class actions, which made federal court the sole venue for securities class actions.⁸⁵

B. Knox v. Agria Corp. and a Comprehensive Explanation of SLUSA’s Jurisdictional Amendment

*Knox v. Agria Corp.*⁸⁶ explained in full depth the effect of SLUSA’s Jurisdictional Amendment and the meaning of its cross-reference to Section 16, and expressly addressed their effect on the Securities Act’s Removal Bar.

Knox was an Exclusively Federal Securities Class Action that was filed in New York state court.⁸⁷ The defendants removed it pursuant to the general federal question removal provision in 28 U.S.C. § 1441(a).⁸⁸ The plaintiffs moved to remand, arguing that the Securities Act’s Removal Bar barred cases involving Securities Act claims — including Exclusively Federal Securities Class Actions — from being removed to federal court, citing a number of decisions holding that the Removal Bar prohibited the removal of Exclusively Federal Securities Class Actions.⁸⁹

recommendation), *adopted*, slip op. (S.D. Ohio Jan. 7, 2004), ECF No. 31.

84. *In re King Pharm.*, 230 F.R.D. 503, 505 (E.D. Tenn. 2004). A 2004 article that examined SLUSA’s Jurisdictional Amendment also arrived at the same conclusion. Morris & Goss, *supra* note 8, at 630 (“[SLUSA]’s amendments explicitly provide that 1933 Act claims that are class actions are not covered by the concurrent-jurisdiction provision . . .”).

85. *Pinto v. Vonage Holdings Corp.*, No. 07-0062 (FLW), 2007 WL 1381746, at *2, 2007 U.S. Dist. LEXIS 33287, at *5 (D.N.J. May 7, 2007) (SLUSA “divest[s] state courts of concurrent jurisdiction over covered class actions”); *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964 (ERK), 2007 WL 778485, at *5, 2007 U.S. Dist. LEXIS 17671, at *16 (E.D.N.Y. Mar. 13, 2007) (“by enacting SLUSA Congress eliminated concurrent jurisdiction for covered class actions, which made federal court the sole venue for securities fraud class actions”); *Rovner v. Holdings Vonage Corp.*, No. 07-178 (FLW), 2007 WL 446658, at *4, 2007 U.S. Dist. LEXIS 8656, at *12 (D.N.J. Feb. 7, 2007) (“the jurisdictional provision in section [Section 22](a) . . . grants exclusive jurisdiction to federal courts over all covered class actions”).

86. 613 F. Supp. 2d 419 (S.D.N.Y. 2009).

87. *See id.* at 421.

88. *See id.*

89. *See id.* at 421-22. The defendants, in turn, cited numerous cases that held that SLUSA had amended the Removal Bar to allow for removal of Exclusively Federal Securities Class Actions. For a fuller discussion of these decisions, see *infra* Part VI.

The *Knox* court began its analysis by carefully examining the text of the Removal Bar.⁹⁰ It observed that the Removal Bar by its terms is limited to “case[s] arising under [the Securities Act] and brought in any State court of competent jurisdiction.”⁹¹ Cases brought in state courts where the state court lacked jurisdiction were outside the scope of the Removal Bar ab initio, and hence were removable under the ordinary federal question removal statute set forth in 28 U.S.C. § 1441(a).⁹² Consequently, the *Knox* court concluded, if SLUSA’s amendments to the Securities Act — and, specifically, SLUSA’s Jurisdictional Amendment — divested state courts of concurrent jurisdiction over Exclusively Federal Securities Class Actions, these actions were outside the scope of the Removal Bar altogether, and hence subject to “federal question” removal.⁹³

Observing that the Securities Act’s Jurisdictional Provision, as amended by SLUSA, granted state courts concurrent jurisdiction “*except as provided in [Section 16] with respect to covered class actions*,”⁹⁴ the *Knox* court examined Section 16 to see what the term “covered class actions” meant and what category of actions were now beyond the jurisdiction of state courts. It first observed that two subsections — (a) and (e) — did not use the term “covered class actions” at all, and hence did not read upon SLUSA’s Jurisdictional Amendment.⁹⁵ It then examined each of the four remaining subsections — (b), (c), (d) and (f) — but noted that all but subsection (f) “deal exclusively with state law claims,” whereas the Securities Act’s Jurisdictional Provision and SLUSA’s Jurisdictional Amendment relate solely to “jurisdiction over ‘suits in equity or actions at law brought to enforce any liability or duty created by the 1933 Act,’” i.e., federal Securities Act claims.⁹⁶ The *Knox* court therefore held that “[t]hat leaves the definitional provision of Section 16” — Section 16(f) — “as the only subsection that can breathe meaning into the SLUSA jurisdictional exception.”⁹⁷

The reason the Jurisdictional Amendment included a cross-reference back to Section 16 was because the term “covered class actions” was both otherwise undefined and being used in a non-standard way. As the *Knox* court explained:

90. *Id.* at 423.

91. 15 U.S.C. § 77v(a) (emphasis added); *Knox*, 613 F. Supp. 2d at 423.

92. *See Knox*, 613 F. Supp. 2d at 423 (“Because this Court holds that no state court has subject matter jurisdiction over covered class actions raising 1933 Act claims, it need not address the scope of the exception to the anti-removal provision.”).

93. *See id.*

94. *Id.* (emphasis and alterations in original) (quoting 15 U.S.C. § 77v(a)).

95. *Id.* at 423-24.

96. *Id.* (citations and internal brackets omitted).

97. *Id.* at 424.

The reference to Section 16 does not add a substantive limitation to the exception to concurrent jurisdiction in Section 22(a); rather, it simply points the reader to the definition of a “covered class action.” Construing this reference as a “guide” makes sense because the phrase “covered class action” is a term of art crafted by Congress. Untethered from Section 16, the term “covered class action” would be susceptible to differing interpretations. Thus, the reference to Section 16 dispels any potential ambiguity concerning the scope of the exception.⁹⁸

Consequently, the Jurisdictional Amendment, in using that defined term and referring back to Section 16, “exempts covered class actions raising 1933 Act claims from concurrent jurisdiction.”⁹⁹ As a result:

[S]tate courts were no longer “court[s] of competent jurisdiction” to hear covered class actions raising 1933 Act claims. Thus, the anti-removal provision does not apply to these covered class actions asserting exclusively federal claims. . . . [B]ecause the anti-removal provision only applies to claims brought in a state court of competent jurisdiction, once SLUSA stripped state courts of subject matter jurisdiction over covered class actions raising 1933 Act claims, the reach of the anti-removal provision receded, leaving covered class actions raising 1933 Act claims exclusively for federal courts.¹⁰⁰

Knox’s holding was followed by a number of courts. They hold that SLUSA’s Jurisdictional Amendment’s reference to Section 16 is intended to refer to the definition therein of “covered class actions” and that state courts consequently lack jurisdiction over covered class actions alleging Securities Act claims, because that is the only interpretation supported by the plain text and that gives meaning to the Jurisdictional Amendment. For example, *Kramer v. Federal National Mortgage Association (In re Fannie Mae 2008 Securities Litigation)*, explicitly embracing *Knox*, held that the Jurisdictional Amendment divested state courts of jurisdiction over Exclusively Federal Securities Class Actions and that the Removal Bar therefore does not apply to such actions.¹⁰¹ More recently, *Lapin v. Facebook, Inc.*, again citing *Knox*, held that:

98. *Id.* (citations omitted).

99. *Id.* at 425.

100. *Id.*

101. *Kramer v. Fed. Nat’l Mortg. Ass’n (In re Fannie Mae 2008 Sec. Litig.)*, Nos. 08

SLUSA amended [Section 22](a) to exempt such covered class actions from [Section 22]'s concurrent jurisdiction provision. As a result, "federal courts alone have jurisdiction to hear covered class actions raising 1933 Act claims."

As recognized in *Knox*, and as this Court finds, the effect of [the Jurisdictional Amendment] is that the non-removal provision in [Section 22](a), on which plaintiffs rely, no longer applies to a "covered class action" alleging claims under the 1933 Act, and, consequently, a class action brought under the 19[3]3 Act is removable pursuant to 28 U.S.C. § 1441(a).¹⁰²

Similarly, the most recent decision addressing this issue, *Wunsch v. American Realty Capital Properties*, agreed with *Knox*'s reasoning to hold that Exclusively Federal Securities Class actions should proceed in federal court.¹⁰³

C. *Opposing Views*

But a line of countervailing authority has emerged, primarily among California courts, holding that state courts retain concurrent jurisdiction over Exclusively Federal Securities Class Actions. In an attempt to distinguish *Knox* and its progeny, these courts argue that the cross-reference in SLUSA's Jurisdictional Amendment to Section 16 is not meant to simply to refer the definition of the term "covered class action" in Section 16(f), but is instead intended to refer to some *other* portion of Section 16, thereby placing an *additional* substantive limitation on the scope of the Jurisdictional Amendment. In other words, these courts maintain that the Jurisdictional Amendment does not exclude covered class actions alleging claims arising under the Securities Act from concurrent

Civ. 7831(PAC), 09 Civ. 1352(PAC), 2009 WL 4067266, at *2, 2009 U.S. Dist. LEXIS 109888, at *10 (S.D.N.Y. Nov. 24, 2009) ("The exception in the jurisdictional provision of Section 22(a) exempts covered class actions raising 1933 Act claims from concurrent jurisdiction. By excluding these covered class actions from concurrent state and federal jurisdiction, federal courts alone have jurisdiction to hear them. After SLUSA, state courts were no longer 'court[s] of competent jurisdiction' to hear covered class actions raising 1933 Act claims. Thus, the anti-removal provision does not apply to these covered class actions asserting exclusively federal claims." (quoting *Knox*, 613 F. Supp. 2d at 425)).

102. *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC et al., 2012 WL 3647409, at *3, 2012 U.S. Dist. LEXIS 119924, at *22-23 (N.D. Cal. Aug. 23, 2012) (footnotes and citations omitted); *see also* Serota, *supra* note 8, at 171-75 (agreeing with the *Knox* analysis) (cited by *Lapin*, 2012 WL 3647409, at *3, 2012 U.S. Dist. LEXIS 119924, at *24).

103. *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 WL 2183035, at *1, 2015 U.S. Dist. LEXIS 48759, at *1 (D. Md. Apr. 14, 2015).

jurisdiction; it excludes from concurrent jurisdiction only covered class actions alleging claims arising under the Securities Act that also comply with some *other* set of conditions set out in Section 16.

But these courts have been unable to define this other set of conditions. The first and perhaps most well-known of these court decisions, *Luther v. Countrywide Financial Corp.*,¹⁰⁴ argues that the Jurisdictional Amendment does not exclude Exclusively Federal Securities Class Actions from state court jurisdiction — but it provides no alternate explanation for what the Jurisdictional Amendment *does* do.¹⁰⁵ Several lower courts have attempted to fill the gap in *Luther*'s reasoning by arguing that the cross-reference to Section 16 is intended to refer to Section 16(b) and the state law claims precluded therein. According to these courts, what SLUSA's Jurisdictional Amendment does, therefore, is exclude from state court jurisdiction only those class actions alleging federal Securities Act claims that are brought *with* these precluded state law claims, and that class actions asserting solely federal claims *without* state law claims remain within the jurisdiction of state courts. This result, however, cannot be squared with Supreme Court precedent.¹⁰⁶

1. *Luther v. Countrywide Financial Corp.*

The *Luther* plaintiffs filed an Exclusively Federal Securities Class Action in California state court, alleging violations of the Securities Act with respect to certain mortgage pass-through securities.¹⁰⁷ At the time the case was first filed, *Knox* had not yet been decided, and the defendants did not attempt to make a *Knox*-type argument that the Securities Act's Removal Bar did not apply.¹⁰⁸ Instead, operating under the assumption that the Securities Act's Removal Bar applied to their case and prevented a straight removal under 28 U.S.C. § 1441(a), the defendants attempted to remove the case under a provision in the Class Action Fairness Act of 2005 ("CAFA"),¹⁰⁹ which, generally speaking, enacted a right of removal for class actions where the amount in controversy exceeds \$5 million if there is minimal diversity between the parties.¹¹⁰ The plaintiffs moved to remand,

104. 125 Cal. Rptr. 3d 716 (Ct. App. 2d Dist. 2011).

105. See *infra* Parts III.C.1-2.

106. See *infra* Part III.C.3.

107. See *Luther v. Countrywide Fin. Corp.*, No. 2:07-CV-08165-MRP(MANx), 2008 U.S. Dist. LEXIS 26534, at *1-2 (C.D. Cal. Feb. 28, 2008) (*Luther I*), *aff'd*, 533 F.3d 1031 (9th Cir. 2008) (*Luther II*).

108. Notice of Removal, *Luther v. Countrywide Fin. Corp.*, No. 2:07-cv-08165-MRP-MAN (C.D. Cal. Dec. 14, 2007), ECF No. 1.

109. See *Luther I*, 2008 U.S. Dist. LEXIS 26534, at *6.

110. 28 U.S.C. §§ 1332(d), 1453. CAFA does not provide for removal of class actions

arguing that any removal rights CAFA might provide did not trump the Securities Act's Removal Bar.¹¹¹

As no party raised the issue of whether the state court had jurisdiction to hear the case in the first instance, the district court did not focus on the provision in the Removal Bar that limits its application to “case[s] . . . brought in any state court of *competent jurisdiction*.”¹¹² Instead, the district court wrote that the Securities Act's Removal Bar was an “absolute prohibition on removal”¹¹³ — an imprecise formulation¹¹⁴ — and expressed doubt as to whether CAFA trumped the Removal Bar.¹¹⁵ The court further held that, in the event of doubt, it must construe removal narrowly, and hence remanded the case.¹¹⁶

The defendants appealed to the Ninth Circuit. As the district court below had done, the Ninth Circuit also flatly — and imprecisely — wrote that “§ 22(a) strictly forbids the removal of cases brought in state court and asserting claims under the [Securities] Act,” without acknowledging the jurisdictional limitations of the Removal Bar.¹¹⁷ The Ninth Circuit also held that the Removal Bar trumped any rights of removal under CAFA and hence affirmed the district court's order to remand the case to state court.¹¹⁸

Following remand to state court, the defendants raised for the first time the argument that SLUSA's Jurisdictional Amendment divested the

involving covered securities, 28 U.S.C. §§ 1332(d)(9), 1453(d), but the mortgage pass-through securities at issue in *Luther* were not covered securities.

111. See *Luther I*, 2008 U.S. Dist. LEXIS 26534, at *6.

112. 15 U.S.C. § 77v(a) (emphasis added).

113. *Luther I*, 2008 U.S. Dist. LEXIS 26534, at *10.

114. Had the court been asked to squarely confront the “of competent jurisdiction” language in the Removal Bar, it would of course have been obligated to give it meaning. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (“It is . . . a cardinal principle of statutory construction that [a court] must ‘give effect, if possible, to every clause and word of a statute.’” (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

115. *Luther I*, 2008 U.S. Dist. LEXIS 26534, at *10.

116. *Id.* at *9-10.

117. *Luther II*, 533 F.3d at 1033. Both the district court and Ninth Circuit opinions were issued before *Knox*, and the defendants and the courts therefore did not have the benefit of *Knox*'s analysis. The defendants apparently did not raise the fact that the Removal Bar is not actually “absolute” but is limited only to cases brought in state courts “of competent jurisdiction” or discuss the meaning of SLUSA's Jurisdictional Amendment and its effect on the Removal Bar, nor did the courts address these issues. See *Luther v. Countrywide Fin. Corp.*, No. CV-09-06162-MRP (JWJx), 2009 WL 3271368, at *1, 2009 U.S. Dist. LEXIS 100138, at *5 (C.D. Cal. Oct. 9, 2009) (*Luther III*).

118. *Luther II*, 533 F.3d at 1034. It is worth noting as an aside that other circuits have expressly split from *Luther II*'s interpretation and hold that CAFA's removal provision *does* trump the Securities Act's Removal Bar with respect to securities that are not traded on a national exchange, leading to a split amongst the courts. See *Katz v. Gerardi*, 552 F.3d 558, 562 (7th Cir. 2009); *N.J. Carpenters Vacation Fund v. Harborview Mortg. Loan Trust 2006-4*, 581 F. Supp. 2d 581, 587-88 (S.D.N.Y. 2008).

state court of subject-matter jurisdiction over the action by filing a demurrer seeking to dismiss the action outright on the grounds that the state court lacked subject-matter jurisdiction.¹¹⁹ The state court stayed the defendants' demurrer and ordered the plaintiffs to file a declaratory action in federal court to ask the federal court to determine whether, in light of *Knox*, state courts retain or lack jurisdiction over Exclusively Federal Securities Class Actions.¹²⁰ The federal court declined to adjudicate the plaintiffs' action for a declaratory judgment, however, and redirected the case to the state court, holding that state courts are equally competent to decide the question of whether the Jurisdictional Amendment divests state courts of jurisdiction over Exclusively Federal Securities Class Actions.¹²¹

The state court considered the issue further and issued an opinion agreeing with *Knox*'s analysis that "Congress intended . . . to divest state courts of concurrent jurisdiction over *all* covered class actions and that Congress enacted SLUSA to make Federal court the exclusive venue for securities class actions."¹²² The state court therefore "f[ound] that it does not have subject matter jurisdiction over Plaintiffs' Securities Act claims" and granted the defendants' demurrer.¹²³

The plaintiffs appealed to the California Court of Appeals. As the *Knox* court had before it, the appellate court focused on the Jurisdictional Amendment's cross-reference to Section 16.¹²⁴ But it began by rejecting *Knox*'s reading that the cross-reference refers to the definition of "covered class action" as set forth in Section 16(f), writing that the Securities Act's Jurisdictional Provision, as amended by Jurisdictional Amendment:

does not say that there is an exception to concurrent jurisdiction for all covered class actions. Nor does it create its exception by referring to the definition of covered class action in section [Section 16](f)(2). Instead, it refers to section [16] without limitation, and creates an exception to concurrent jurisdiction only as provided in section [16] "with respect to covered class actions."

In order to determine whether this case is exempted from the rule of concurrent jurisdiction, we must look to all of section

119. See *Luther III*, 2009 WL 3271368, at *1, 2009 U.S. Dist. LEXIS 100138, at *5-6.

120. See *id.*

121. *Id.* at *3, 2009 U.S. Dist. LEXIS 100138, at *10-13.

122. *Luther v. Countrywide Fin. Corp.*, No. BC380698, slip op. at 9 (Cal. Super. Ct. L.A. Cnty. Jan. 6, 2010) (*Luther IV*) (emphasis in original) (footnote and internal quotation marks omitted), *rev'd*, 125 Cal. Rptr. 3d 716 (Ct. App. 2d Dist. 2011) (*Luther V*).

123. *Id.*

124. *Luther V*, 125 Cal. Rptr. 3d at 719.

[16], and see what it provides “with respect to covered class actions.”¹²⁵

The *Luther* court then proceeded to go through each of the six subsections in Section 16 to see “what it provides ‘with respect to covered class actions.’”¹²⁶ After doing so, however, the court came to the conclusion that *none* of them applied, writing that “[n]othing, then, in Section [16] describes this case, and thus nothing in section [16] puts this case into the exception to the rule of concurrent jurisdiction.”¹²⁷ The court therefore held that the state court had subject-matter jurisdiction over the case and reversed the trial court’s dismissal.¹²⁸

2. Where The *Luther* Court Erred

The *Luther* court goes no further, however, and thereby ignores the elephant in the room. If SLUSA’s Jurisdictional Amendment does not apply to the *Luther* case, to what category of cases *does* it apply? If the Jurisdictional Amendment’s cross-reference to Section 16 does not refer to the definition of “covered class actions” in Section 16(f), to which part of Section 16 *does* it refer? The *Luther* court provided no answer to these questions.

The *Luther* opinion notes that courts cannot “read statutes in little bites”¹²⁹ as the basis for rejecting *Knox*’s conclusion that the reference in SLUSA’s Jurisdictional Amendment is to Section 16(f). Thus, *Luther* argued, Congress could have been more specific (by explicitly referencing Section 16(f)), but it chose not to do so. In other words, *Luther* resisted reading the cross-reference as only pointing to the definitional subsection of Section 16. But *Luther*’s putative “big bite” reading of Section 16 comes to the conclusion that *none* of Section 16’s other five subsections, either individually or taken together, bear on the meaning of SLUSA’s Jurisdictional Amendment either. As such, that reading fails to exclude *any* identifiable category of actions from concurrent state court jurisdiction.¹³⁰

125. *Id.* at 719-20.

126. *Id.* at 720.

127. *Id.* at 721.

128. *Id.* at 721, 723. The defendants sought further review before both the California Supreme Court and the U.S. Supreme Court, but both petitions were denied. *Luther v. Countrywide Fin. Corp.*, No. S194319, 2011 Cal. LEXIS 9830 (Cal. Sept. 14, 2011) (denying petition for review); *Countrywide Fin. Corp. v. Luther*, 132 S. Ct. 832 (2011) (denying petition for writ of certiorari).

129. *Luther V*, 125 Cal. Rptr. 3d at 720 (quoting *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643 (2006)).

130. *See id.* at 721.

In light of *Luther*'s failure to offer an alternative explanation as to what the Jurisdictional Amendment's cross-reference *does* refer, its statement that the cross-reference *cannot* refer to Section 16(f)'s definitional provisions is little more than ipse dixit.

Courts are surely not compelled to adopt a construction of SLUSA's Jurisdictional Amendment that gives it no legs. There is an obvious explanation why Congress did not refer specifically to Subsection 16(f) in the Jurisdictional Amendment: when the bill that was to become SLUSA was first introduced, there was no proposed Section 16(f) for the Jurisdictional Amendment to reference. Statutory definitions are typically placed at the beginning or end of the statutory section in which they appear¹³¹; in Section 16, they were placed at the end. As a result, as the bill was being drafted and revised, the subsection letter designation of the definitional provision kept changing, as amendments were added or deleted, affecting what the last subsection letter would be. When the bill was first introduced, the definitions were set forth in Section 16(d), which at the time was the last section of the proposed new Section 16.¹³² As new subsections were added and removed, the definition subsection — which remained at the end — changed from being subsection (d) to (f)¹³³ to (g)¹³⁴ to (f) again.¹³⁵ The Jurisdictional Amendment's reference to Section 16 as a whole and not Section 16(f) specifically is more likely a result of the drafting process than an indication that the cross-reference was not intended to refer to Section 16(f). While the definition of "covered class actions" is set out in Section 16(f), by its terms it applies to all of Section 16,¹³⁶ and referring to Section 16 saved the Jurisdictional Amendment from having to be constantly revised upon each new iteration of the bill — and saves it from having to be revised should Congress decide in the future to add or remove other provisions from Section 16.¹³⁷

131. See DONALD HIRSCH, *DRAFTING FEDERAL LAW* 24 (2d ed. 1989) (explaining the ideal ordering of various aspects of legislation); U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE LEGISLATIVE COUNSEL, *HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE* 23, 29 (1995); U.S. SENATE OFFICE OF THE LEGISLATIVE COUNSEL, *LEGISLATIVE DRAFTING MANUAL* 9 (1997) [hereinafter *SENATE DRAFTING MANUAL*].

132. S. 1260, 105th Cong. § 2(a)(1)(d) (as introduced in Senate, Oct. 7, 1997).

133. *Id.* § 3(a)(1)(f) (as reported in Senate, May 4, 1998).

134. *Id.* § 3(a)(1)(g) (as passed by Senate, May 13, 1998).

135. *Id.* § 101(a)(1)(f) (as passed by House, July 22, 1998).

136. 15 U.S.C. § 77p(f) ("For purposes of *this section*, the following definitions shall apply . . .") (emphasis added).

137. See *SENATE DRAFTING MANUAL*, *supra* note 131, at 20, 24 ("DEFINED TERMS[:]. . . . NO PARAGRAPH REFERENCE. — To eliminate the need to make conforming amendments that would be required if the paragraph (or other subdivision) designation of a defined term were changed by the amendment of a definitions provision, refer only to the definitions provision itself and not to the particular subdivision that

As *Knox* explained, the cross-reference is necessary because SLUSA's Jurisdictional Amendment, and the Securities Act's Jurisdictional Provision as a whole, do not define the term "covered class action."¹³⁸ That definition appears only in Section 16 and does not by its own terms apply to sections other than Section 16.¹³⁹ Hence, the Jurisdictional Provision, which is located in Section 22(a), requires a cross-reference.¹⁴⁰ While *Luther* attempts to reject *Knox*'s reasoning, it fails to offer any internally consistent alternative. Instead, *Luther* attempts to distinguish *Knox*, arguing, for example, that "[t]he issue in *Knox* was removal . . . [but t]his case cannot be removed because it does not concern covered securities,"¹⁴¹ a reference to Section 16(c), which provides for removal only for cases involving covered securities.¹⁴² This is a mischaracterization: *Knox* expressly refrained from offering any opinion on Section 16(c) or any of SLUSA's removal amendments, deciding the case solely on the basis of *jurisdiction* and removal under the separate statutory provision 28 U.S.C. § 1441(a).¹⁴³ Additionally, *Luther* supports its holding by contending that

contains the definition." See generally *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 n.2 (2d Cir. 2008) (noting confusion where Congress promulgates statutes with cross-references to definitions in specific subsections and then fails to update cross-references when statutes are amended); HIRSCH, *supra* note 131, at 17 ("[T]he renumbering or relettering of provisions of current law can create confusion. If the redesignated provision is referred to in other laws, the drafter who fails to correct those references will mislead individuals using those other laws.").

138. See *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 424 (S.D.N.Y. 2009).

139. See *id.* ("Untethered from Section 16, the term 'covered class action' [in Section 22] would be susceptible to differing interpretations."); see also *supra* note 61 (discussing the inapplicability of the definition to other sections).

140. See *Knox*, 613 F. Supp. 2d at 424 ("Construing [the Jurisdictional Amendment's] reference [to Section 16] as a 'guide' makes sense because the phrase 'covered class action' is a term of art crafted by Congress."); see also *supra* note 61. Indeed, this cross-reference was all the more essential when the provision that would become SLUSA's Jurisdictional Amendment was first drafted: the original version of the bill used the term "class actions," rather than "covered class actions," S. 1260, 105th Cong. § 2(a)(1)(d) (as introduced in Senate, Oct. 7, 1997), a term that already carries a meaning in federal law and in ordinary usage different from that in SLUSA, see FED. R. CIV. P. 23 (describing the requirements and types of class actions). The cross-reference was therefore necessary to identify that the term "class action" in Section 22(a) was meant to be the term of art *as it was defined in Section 16*, opposed to the more general definition of the term.

141. *Luther V*, 125 Cal. Rptr. 3d at 721. By drawing this distinction, *Luther* never addressed the question of whether an Exclusively Federal Securities Class Action involving a covered security would be removable.

142. 15 U.S.C. § 77p(c). SLUSA's Jurisdictional Amendment and the Securities Act's Jurisdictional Provision, by contrast, never use the term "covered security."

143. See *Knox*, 613 F. Supp. 2d at 421-23 (deciding removal based on 28 U.S.C. § 1441(a), not Section 16(c), "[b]ecause this Court holds that no state court has subject matter jurisdiction over covered class actions raising 1933 Act claims, [and] need not address the scope of the exception to the anti-removal provision").

Exclusively Federal Securities Class Actions cannot be removed, and “the fact that the case . . . cannot be removed to federal court if it is filed in state court, tells us that the state court has jurisdiction to hear the action.”¹⁴⁴ But this argument, of course, is wholly circular — it simply assumes the very non-removability that it is trying to prove. *Luther* conspicuously fails to explain what category of actions, if not Exclusively Federal Securities Class Actions, the Jurisdictional Amendment *does* eliminate from state court jurisdiction. Rather, *Luther* threatens to construe this category as a null set and thereby nullify the Jurisdictional Amendment, in violation of the basic rules of statutory construction.¹⁴⁵

3. *Luther’s* Progeny, and How They Run Afoul of the Supreme Court’s Decision in *Kircher v. Putnam Funds Trust*

In the wake of the *Luther* decisions, several lower court opinions — *Rajasekaran v. CytRx Corp.*,¹⁴⁶ *City of Birmingham Retirement and Relief System v. MetLife, Inc.*,¹⁴⁷ *Robinson v. Audience, Inc.*,¹⁴⁸ and *Harper v. Smart Technologies, Inc.*¹⁴⁹ — have offered an alternative interpretation of the Jurisdictional Amendment’s cross-reference to Section 16. These courts posit that the cross-reference is intended not to refer to Section 16(f) but to Section 16(b) (and the related Section 16(c), which cross-references Section 16(b)).

As noted above, Section 16(b) defines a category of state law claims that plaintiffs are precluded from bringing in covered class actions relating to nationally traded securities.¹⁵⁰ Section 16(c) allows for the removal of covered class actions involving a nationally traded security “as set forth in subsection (b).”¹⁵¹ These courts maintain that SLUSA’s Jurisdictional Amendment, through its cross-reference to Section 16, only strips state courts of jurisdiction over covered class actions that plead those state law

144. *Luther V*, 125 Cal. Rptr. 3d at 721.

145. *See supra* notes 50-51 (analyzing fundamental rules of statutory construction).

146. No. CV 14-3406-GHK (PJWx), 2014 WL 4330787, 2014 U.S. Dist. LEXIS 124550 (C.D. Cal. Aug. 21, 2014).

147. No. 2:12-cv-02626-HGD, 2013 WL 5526621, 2013 U.S. Dist. LEXIS 147675 (N.D. Ala. Aug. 23, 2013).

148. No. 1:12-cv-232227, 2013 WL 2318459 (Cal. Super. Ct. Santa Clara Cnty. May 28, 2013).

149. No. 4:11-cv-05232-SBA, slip op. (N.D. Cal. Sept. 28, 2012), ECF No. 42; *accord* *Layne v. Countrywide Financial Corp.*, Nos. BC389208, BC389332, slip op. (Cal. Super. Ct. L.A. Cnty. Feb. 5, 2010), *available at* 2010 WL 1637425 (*Layne II*), which was issued roughly contemporaneously with *Luther IV*, a year and a half before the *Luther V* appellate decision.

150. 15 U.S.C. § 77p(b); *see supra* Part II.C.2.

151. 15 U.S.C. § 77p(c); *see supra* Part II.C.3.

claims precluded by Section 16(b). According to these courts, exclusively Federal Securities Class Actions, which by definition do not plead any state law claims, are consequently not excluded and remain subject to the Securities Act's Removal Bar.

Their reasoning for linking SLUSA's Jurisdictional Amendment with Sections 16(b) and 16(c) is this: First, these courts generally agree — as they must — that the Jurisdictional Amendment had *some* effect, and therefore must have eliminated state court jurisdiction over *some* category of cases.¹⁵² These courts then look to Section 16 and see that Congress, in Section 16(b), barred certain claims by precluding their use in class actions (and in Section 16(c), allowed for removal of class actions “as set forth in subsection (b)”).¹⁵³ From there, these courts then make the inferential leap that the category of claims and actions that Congress *precluded* in Section 16(b) and allowed for *removal* in Section 16(c) must be the same as the category of class actions for which Congress eliminated state court *jurisdiction* in the Jurisdictional Amendment.¹⁵⁴ But the text of the

152. *MetLife*, 2013 WL 5526621, at *4, 2013 U.S. Dist. LEXIS 147675, at *14 (“The newly-added language in [Section 22] provides that with some category of cases, concurrent state jurisdiction will no longer be available.”); *Robinson*, 2013 WL 2318459, at *3 (implicitly recognizing that the Jurisdictional Amendment must eliminate some category of cases from concurrent state court jurisdiction); *Harper*, slip op. at 8-9 (same); *see also Layne II*, slip op. at 8 (“The plain language of [Section 22] indicates that there is some subset of cases or claims brought under the subchapter [the Securities Act] over which state courts no longer have concurrent jurisdiction . . .”).

153. *MetLife*, 2013 WL 5526621, at *4, 2013 U.S. Dist. LEXIS 147675, at *15 (“While [Section 22] does not specify the type of 1933 Act cases for which state courts will no longer have concurrent jurisdiction, it does refer the reader to [Section 16] for clarification. Specifically [Section 16](c) states Furthermore, [Section 16](b) indicates . . .”) (emphasis added); *Robinson*, 2013 WL 2318459, at *3 (“[I]n interpreting the jurisdiction provision of Section 22(a), the Court cannot focus exclusively on the generic definitional portion of Section 16 (subd. (f)), but properly looks to the portions of Section 16 (*subds. (b) and (c)*) that actually involve divesting state courts of jurisdiction . . . through the process of removal.”) (emphasis added); *Harper*, slip op. at 9 (“[T]he starting point for determining whether an action is subject to the exception is determined by reference to section [16], not solely whether the action is a covered class action. Section [16] contains *the SLUSA's preclusion provision* . . .”) (emphasis added); *see also Layne II*, slip op. at 8 (“[T]he text of [Section 22] . . . refers the reader to [Section 16] That section contains a provision entitled ‘Class Action Limitations,’ . . .”).

154. *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 WL 4330787, at *5, 2014 U.S. Dist. LEXIS 124550, at *12-13 (C.D. Cal. Aug. 21, 2014) (“[O]f all of the provisions [in Section 16], only subsection (b) imposes any jurisdictional limitations, and even still, those limitations apply only to class actions ‘based upon the statutory or common law of any State.’”); *MetLife*, 2013 WL 5526621, at *4, 2013 U.S. Dist. LEXIS 147675, at *15 (generally same); *Robinson*, 2013 WL 2318459, at *3 (generally same); *Harper*, slip op. at 10 (“[T]he Court finds that the SLUSA's revision to [the Jurisdictional Provision] does not vest federal courts with exclusive jurisdiction over any and all covered class actions. Rather, the exception to concurrent jurisdiction only applies to precluded actions;

Jurisdictional Amendment, and the Securities Act's Jurisdictional Provision, address only *federal law* claims, not the state law claims described in Section 16(b).¹⁵⁵ Moreover, the approach taken by these courts has been squarely rejected by the Supreme Court in *Kircher v. Putnam Funds Trust*,¹⁵⁶ where the Court held that, under SLUSA, state courts *retain* subject-matter jurisdiction of these actions and claims.

Kircher involved eight separate putative class actions alleging state law claims filed in Illinois state court by eight groups of investors in a mutual fund, each of which sought to represent a class of investors allegedly injured by the devaluation of their holdings.¹⁵⁷ The defendants

that is, a covered class action that also meets all the requirements of section [16](b).") (citations omitted); *accord Layne II*, slip op. at 8-9 ("[I]t was Congress's intent to eliminate concurrent state court jurisdiction over only those cases that fall under the specific class action limitation of [Section 16] — covered class actions brought under state law." (citing Section 16(b))). These courts, like *Luther*, claim that the Jurisdictional Amendment's reference to Section 16 cannot refer to the definitional provisions in Section 16(f), *see Robinson*, 2013 WL 2318459, at *3 (citing *Luther V*, 125 Cal. Rptr. 3d at 719-20); *accord Layne II*, slip op. at 7 — but conspicuously do not address the fact that the Jurisdictional Amendment does not explicitly refer to Sections 16(b) or 16(c) any more than it does to Section 16(f).

155. Another opinion, *Niitsoo v. Alpha Natural Resources, Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012), similarly tried to link the Jurisdictional Amendment to Section 16(b) but recognized that doing so was inconsistent with the language of the Securities Act's Jurisdictional Provision that it amended, as the Jurisdictional Provision only address *federal* claims and Section 16(b) only addresses *state* claims. *See id.* at 805 ("None of [Section 16]'s four substantive subsections discuss federal law at all — subsections (b), (d), and (e) all deal indisputably with *state law* class actions, and do not have anything to do with concurrent jurisdiction over federal securities class actions 'under this subchapter.' Under the Supreme Court's interpretation, subsection (c) also deals only with state law class actions.") (emphasis in original). The *Niitsoo* court's solution was to simply ignore the fact that the Jurisdictional Provision only refers to federal securities claims, *see id.* ("I have no problem treating [the Jurisdictional Provision's reference to federal claims] as unintentional and superfluous. Congress's failure to excise those words was inadvertent."), in order to be able to shoehorn upon it the court's reading that the Jurisdictional Amendment only eliminates jurisdiction of state law claims. Not only does this interpretation violate basic tenets of statutory construction, *see, e.g., United States v. Monsanto*, 491 U.S. 600, 611 (1989) ("[I]nterpretative canons are not a license for the judiciary to rewrite language enacted by the legislature." (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1989))) (internal brackets omitted), but removing the reference to federal securities claims in the Jurisdictional Provision also transforms it into a provision that grants federal courts jurisdiction over *every* civil action — "[t]he district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section [16] of this title with respect to covered class actions, of all suits in equity and actions at law," period, *see* 15 U.S.C. § 77v(a) — a result that is patently nonsensical.

156. 547 U.S. 633 (2006).

157. *Id.* at 637.

removed the actions to federal court under Section 16(c).¹⁵⁸ The plaintiffs moved to remand the cases, arguing that the removal provisions of Section 16(c) were limited to the cases set forth in Section 16(b), i.e., state law claims in connection with the purchase and sale of a covered security, and asserted that their actions, which involved only “holder” claims with no allegations of “purchases” or “sales,” fell outside the scope of Section 16(b).¹⁵⁹ The district court sided with the plaintiffs, holding that plaintiffs’ “holder” claims were not within the scope of the claims listed in Section 16(b) and therefore were not removable under Section 16(c).¹⁶⁰ As there was no other basis for exercising federal jurisdiction — the cases, which pleaded only state law claims, presented no federal question, and additionally were not subject to diversity jurisdiction¹⁶¹ — the district court remanded the cases to state court.

The defendants appealed to the Seventh Circuit. Before reviewing the case, however, the Seventh Circuit was faced with 28 U.S.C. § 1447(d), which provides, generally speaking, that orders remanding cases to state courts are not reviewable on appeal, no matter how erroneous that order might be.¹⁶² The Seventh Circuit held that 28 U.S.C. § 1447(d) did not apply and — to satisfy itself that this holding made “practical sense” — further reasoned that SLUSA establishes that only federal courts can adjudicate whether Section 16(b) precludes a state law claim, and that, as the federal appellate court, it had to review the district court’s opinion on Section 16(b) preclusion, a major substantive issue in the case, as the issue would otherwise be unreviewable.¹⁶³ The Seventh Circuit therefore took

158. *See id.*

159. *See id.* at 637-38. The Supreme Court held in *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 88-89 (2006), that “holder” state law claims are also subject to Section 16(b) preclusion under SLUSA, but this decision had not yet been issued at the time of the district court proceedings in *Kircher*. *See Kircher*, 547 U.S. at 638 n.5, 645.

160. *See Kircher*, 547 U.S. at 638.

161. *See id.* at 637, 641-42 & n.10.

162. *See id.* at 640-41 (“[W]here the [remand] order is based on one of the grounds enumerated in 28 U.S.C. § 1447(c), review is unavailable no matter how plain the legal error in ordering the remand.” (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977))) (internal brackets omitted). As an aside, in addition to express statutory exceptions to this general rule that allow for appellate review of remand orders of cases removed pursuant to 28 U.S.C. §§ 1442 or 1443, appellate courts may review remand orders if the remand order was based on grounds unrelated to those set forth in 28 U.S.C. § 1447(c). *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52 (1976).

163. *See Kircher*, 547 U.S. at 639 (“To satisfy itself that its decision [to hear defendants’ appeal] made ‘practical sense,’ the [Seventh Circuit] proposed that [SLUSA] reserves to the Federal Judiciary the exclusive authority to make the preclusion decision. Treating remand orders in this context as immunized from appeal by § 1447(d) would thus mean that ‘a major substantive issue in the case would escape review,’ since it would not be open to resolution in the state court subject to review by this Court.” (citing *Kircher v. Putnam*

the appeal and, on the merits, held that “holder” claims fall within Section 16(b) and therefore are removable.¹⁶⁴

The Supreme Court disagreed. It held that 28 U.S.C. § 1447(d) applied and that the Seventh Circuit therefore had no power to review the district court’s remand order.¹⁶⁵ In doing so, the Supreme Court also rejected the Seventh Circuit’s notion that only federal courts have jurisdiction over cases alleging claims set forth in Section 16(b). To the contrary, it expressly held that “nothing in [SLUSA] gives the federal courts exclusive jurisdiction over preclusion decisions” under Section 16(b).¹⁶⁶ Rather, state courts were “equally competent bod[ies] to make the preclusion determination.”¹⁶⁷ In reversing the Seventh Circuit and reinstating the district court’s original decision to remand the case, the Supreme Court thus left the question of Section 16(b) preclusion *entirely in the hands of the state court*, trusting the state court — an equally competent body — to properly apply Section 16(b) and make the preclusion determination.¹⁶⁸ The *Rajasekaran*, *MetLife*, *Robinson* and *Harper* courts’ conclusion that the actions over which the Jurisdictional Amendment eliminates state court jurisdiction is the category of actions asserting state law claims precluded in Section 16(b) is therefore decidedly wrong — *Kircher* establishes that these are precisely the actions over which state courts *retain* jurisdiction.¹⁶⁹

Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004))).

164. *See id.* (“The Seventh Circuit subsequently consolidated the funds’ appeals and decided on the merits, that [SLUSA] does preclude the investors’ claims.” (citing *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005))).

165. *See id.* at 640-41.

166. *Id.* at 646.

167. *Id.* (citations omitted).

168. *See id.* at 646-48 (“[T]he [defendants] can presently . . . ask for dismissal on grounds of [Section 16(b)] preclusion when they return to the state court. . . . [W]e have no reason to doubt that the state court will duly apply [applicable law] . . .”).

169. The reasoning that the *Rajasekaran* and *Harper* courts offer, for example — that “[t]he most natural, straightforward reading of [Sections 16(b) and Section 16(c)] is that only covered class actions based upon state law . . . can be removed to federal court, and only for the purpose of dismissing the precluded state law claims” and that “[Section 16](b) imposes . . . jurisdictional limitations,” *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 WL 4330787, at *3, *5, 2014 U.S. Dist. LEXIS 124550, at *8, *12 (C.D. Cal. Aug. 21, 2014), or that “SLUSA makes precluded actions [as set forth in Section 16(b)] removable to ensure that they are not litigated in state court, and that federal courts are the sole arbiter of whether an action is precluded,” *Harper v. Smart Techs., Inc.*, No. 4:11-cv-05232-SBA, slip op. at 9 (N.D. Cal. Sept. 28, 2012), ECF No. 42 (citations omitted) — is precisely the same as the Seventh Circuit’s reasoning that the Supreme Court rejected in *Kircher*. *See Kircher*, 547 U.S. at 645-46 (“The Seventh Circuit’s reading of subsection (c) so as to treat the application of the preclusion rule as nonjurisdictional was in part motivated by its assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. . . . But . . . nothing in [SLUSA] gives the federal courts exclusive

Fundamentally, the central error that these courts make is improperly equating the concepts of preclusion and removal with the separate concept of jurisdiction.¹⁷⁰ They are decidedly distinct. The fact that an action may be removable does not mean that a state court lacks jurisdiction over the action.¹⁷¹ Likewise, the fact that a claim may be precluded does not mean that a court lacks jurisdiction over the claim.¹⁷² As the Supreme Court held, defendants remain free to move in state court for dismissal of their claims on the grounds of SLUSA preclusion (or, if they wish, to litigate their claims on the merits).¹⁷³ SLUSA's Jurisdictional Amendment is not a restatement of Section 16(b)'s preclusion provision or Section 16(c)'s removal provision, and the category of class actions the Jurisdictional Amendment excludes from state court jurisdiction is not the same as the category of claims precluded by Section 16(b) or the category of actions removable under Section 16(c).¹⁷⁴

We are therefore left in the same place we were after *Luther*: SLUSA's Jurisdictional Amendment eliminates state court jurisdiction over some category of class actions "brought to enforce any liability or duty created by [the Securities Act]."¹⁷⁵ No court has been able to explain how — without violating *Kircher* — the category of actions excluded from state

jurisdiction over preclusion decisions."). Cases like *Rajasekaran* and *Harper* also cite dictum from a Ninth Circuit case, *Madden v. Cowen & Co.*, 576 F.3d 957, 965 (9th Cir. 2009), which purports that "SLUSA authorizes defendants to remove such actions to federal court, effectively ensuring that federal courts will have the opportunity to determine whether a state action is precluded" — but this dictum cannot stand in the face of *Kircher*'s holding that state courts may in fact decide preclusion issues as well.

170. *Robinson* exemplifies this confusion, characterizing subsections 16(b) and (c) as "divesting state courts of *jurisdiction* . . . through the process of *removal*," wholly conflating the two concepts. *Robinson v. Audience, Inc.*, No. 1:12-cv-232227, 2013 WL 2318459, at *3 (Cal. Super. Ct. Santa Clara Cnty. May 28, 2013) (emphasis added).

171. For example, an action between diverse parties alleging state law claims for more than \$75,000 is removable to federal court, *see* 28 U.S.C. §§ 1332(a), 1441(a), but the state court retains jurisdiction over these types of actions.

172. *See Kircher*, 547 U.S. at 646 (noting that Section 16(b) precludes certain class actions from going forward but that state courts retain jurisdiction over them); *see also, e.g.*, *Domnister v. Exclusive Ambulette, Inc.*, 607 F.3d 84, 91 (2d Cir. 2010) ("[A] district court *must have subject-matter jurisdiction* in order to dismiss a case based on either issue or claim preclusion.") (emphasis added); *Bates v. Harvey*, 518 F.3d 1233, 1240 (11th Cir. 2008) ("[I]ssue preclusion relates to the question of when a federal court may decline to hear a matter of dispute *within its jurisdiction*.")) (emphasis added).

173. *See Kircher*, 547 U.S. at 646.

174. Among other things, reading SLUSA's Jurisdictional Amendment as covering the exact same category of actions as those set out in Sections 16(b) and 16(c) runs afoul of the fundamental precept of statutory interpretation that "legislative enactments should not be construed to render their provisions mere surplusage." *See, e.g.*, *Dunn v. CFTC*, 519 U.S. 465, 472 (1997).

175. 15 U.S.C. § 77v(a).

court jurisdiction could not include Exclusively Federal Securities Class Actions. The only interpretation that is consistent with *Kircher* is the one set forth in *Knox*: namely, that Exclusively Federal Securities Class Actions *are* included in this category of actions for which the Jurisdictional Amendment eliminates state court jurisdiction, and such actions are therefore not subject to the Removal Bar and can be removed under 28 U.S.C. § 1441(a).¹⁷⁶

IV. INTERPRETING SLUSA'S JURISDICTIONAL AMENDMENT IN LIGHT OF THE PRECEPTS OF FEDERALISM

This conclusion is further compelled by the demands of federalism.

As discussed above, even *Knox*'s detractors acknowledge that SLUSA's Jurisdictional Amendment divested state courts of jurisdiction over *some* category of covered class actions that allege Securities Act claims.¹⁷⁷ If one were to assume that this category does not include covered class actions that allege solely Securities Act claims, then by definition it must include a category of covered class actions that allege Securities Act claims together with state law claims. Under this hypothetical, state courts retain jurisdiction over covered class actions that allege only federal Securities Act claims — but lose jurisdiction if state claims are brought along with the federal claims, *by virtue of the presence of state claims*. As such, state courts are stripped of jurisdiction over covered class actions based on *their states' own laws*, while they retain jurisdiction of those that are not. This presents concerns of a constitutional dimension.

In general, “[t]he States . . . have great latitude to establish the structure and jurisdiction of their own courts.”¹⁷⁸ The Supreme Court has never endorsed the practice of stripping state courts of jurisdiction over their own state law,¹⁷⁹ and as one commentator notes, “[t]he Supreme Court has at least suggested that states generally have a constitutional interest in enforcing their own laws against individuals over whom they constitutionally may exercise jurisdiction.”¹⁸⁰ Consequently, an

176. Moreover, 28 U.S.C. § 1441(f) makes clear that removal is proper even where “the State court from which such civil action is removed did not have jurisdiction over that claim.”

177. See *supra* note 152 (*MetLife, Robinson, Harper, and Layne II* recognizing that the Jurisdictional Amendment eliminated some category of cases from state court jurisdiction).

178. *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990)).

179. See Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1006-09 (2006).

180. *Id.* at 1008.

interpretation of the Jurisdictional Amendment that would divest state courts of jurisdiction over claims based on their state law is highly questionable.¹⁸¹ Rather than presume that Congress acted in an unprecedented manner to enact a questionable policy of stripping state courts of concurrent jurisdiction *over their own state law*, the better reading of the Jurisdictional Amendment is that it strips state courts of jurisdiction over Exclusively *Federal Securities Class Actions* — an act that is plainly within Congress’s power.¹⁸² As the Supreme Court has stated, “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States,”¹⁸³ and in construing the Jurisdictional Amendment, courts should do so in a way so as “not to interfere with a state court’s legitimate exercise of its own jurisdiction.”¹⁸⁴

181. It might be a different question had SLUSA *preempted* the field of securities regulation. Congress would have been well within its authority to preempt state securities laws. *See, e.g.,* Georgene Vario, *Judicial v. Congressional Federalism: The Implication of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 *LOY. L.A. L. REV.* 1559, 1606 (2000). But SLUSA is not a “preemption provision” and “does not itself displace state law with federal law”; rather, all that SLUSA does with respect to state law claims is to “make[] some state-law claims nonactionable *through the class-action device* in federal as well as state court.” *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) (emphasis added). Professor Vario argues that even allowing removal of state law claims may present federalism concerns (although she concludes in the end that allowing removal is constitutional). *See Vario, supra*, at 1606-07, 1615-16 (noting while it is within Congress’s power to preempt state remedies, removing cases to federal court to curtail state remedies is unusual and a cause for federalism concerns). And removal is optional; a defendant can decide not to remove and “elect to leave a case where the plaintiff filed it” in state court. *Kircher*, 547 U.S. at 634. Subject-matter jurisdiction, however, cannot be conferred by the parties. An interpretation of SLUSA’s Jurisdictional Amendment that a state court can hear an Exclusively Federal Securities Class Action but cannot hear the same action if a state law claim is added, even with the consent of the parties, is, a fortiori, is all the more constitutionally suspect.

182. *See, e.g., Haywood v. Drown*, 556 U.S. 729, 758 (2009) (“[W]here a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction.” (quoting *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876))) (internal brackets omitted).

183. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

184. *See Enrique Schaefer, A Rose By Any Other Name: Why a Parens Patriae Action Can Be a Mass Action Under the Class Action Fairness Act*, 16 *N.Y.U. J. LEGIS. & PUBLIC POL’Y* 39, 84 (2013) (citing *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010)); *see also Chadbourne & Parke LLP v. Troice*, 134 S.Ct. 1058, 1068 (2014) (“Under numerous provisions, [SLUSA] purposefully maintains state legal authority, especially over matters that are primarily of state concern.”).

V. INTERPRETING SLUSA'S JURISDICTIONAL AMENDMENT IN LIGHT OF THE LEGISLATIVE HISTORY AND PURPOSE OF THE PSLRA AND SLUSA

The legislative history of the PSLRA and SLUSA further supports the conclusion that Congress, in enacting SLUSA, intended all securities cases using the class action device, including Exclusively Federal Securities Class Actions, to be litigated in the federal courts.¹⁸⁵

Congress expressly set forth SLUSA's goals at the start of the Act:

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) 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;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.¹⁸⁶

The legislative history leading up to the enactment of SLUSA further confirms that Congress intended to have all securities class actions litigated in federal court and understood its remedies to apply to such class actions generally, without an exception for Exclusively Federal Securities Class Actions. The Senate subcommittee introducing the bill that would become SLUSA characterized it as "basically say[ing] that for class action suits,

185. While there is no discussion in the legislative history that focuses specifically on SLUSA's Jurisdictional Amendment or the Securities Act's Jurisdictional Provision, the legislative history of SLUSA as a whole makes clear that Congress intended securities class actions to be litigated in federal court.

186. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2, 112 Stat. 3227, 3227.

and class action suits only, where you are dealing with a stock that is traded nationally, so there is clearly an overriding national interest, that those suits have to be filed in Federal court.”¹⁸⁷ No exception was made for Exclusively Federal Securities Class Actions. The House committee that reported on the bill similarly stated that SLUSA’s intent was to “make Federal court the exclusive venue for securities fraud class action litigation,”¹⁸⁸ without noting any exceptions. Likewise, the joint House/Senate conference committee explained that “[t]he 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,”¹⁸⁹ again without noting any exceptions. Statements of members of Congress during the debates further evidence this shared understanding that “[SLUSA] would in effect require that *every* large securities class action be brought into federal court.”¹⁹⁰ Commentators reviewing the legislation as it was pending before Congress expressed the same contemporaneous understanding.¹⁹¹ Even witnesses who testified before Congress to oppose SLUSA’s enactment and who argued that securities class actions alleging state law claims should be allowed to remain in state court agreed that class actions alleging claims under the federal securities laws should only proceed in federal court.¹⁹²

Those who oppose the removal of Exclusively Federal Securities Class Actions to federal court correctly note that one of Congress’s

187. *S. Subcomm. 1997 SLUSA Hearing, supra* note 45, at 2 (opening statement of Sen. Phil Gramm, Chairman, Subcomm. on Sec. of S. Comm. on Banking, Hous. & Urban Affairs).

188. H.R. REP. NO. 105-640, at 10 (1998).

189. H.R. REP. NO. 105-803, at 13 (1998).

190. 144 CONG. REC. S4778-03, at S4797 (statement of Sen. Dianne Feinstein) (emphasis added); *accord H. Subcomm. SLUSA Hearing, supra* note 27, at 1 (statement of Rep. Tom Bliley, Chairman, Comm. on Commerce) (“This legislation makes Federal court the exclusive venue for securities class actions. In this way, the trial bar will not be able to use State court as a means of evading the changes of the [PSLRA].”); *id.* at 4 (statement of Rep. Rick White) (“What [SLUSA] is all about is simply to realize the intent of the [PSLRA]. It does that by making sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time [in the PSLRA] and have to go to Federal court.”).

191. *See Perino, supra* note 28, at 335 (writing in 1998 that the pending bill that would become SLUSA, as well as two other alternative bills, “[a]ll . . . eliminate concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts”).

192. *See H. Subcomm. SLUSA Hearing, supra* note 27, at 118 (statements of Rep. Rick White and Richard Painter, Professor, Cornell University Law School) (“MR. WHITE. Let me ask you one other question, just to understand your point that really it’s better to let State courts decide some of these issues. I take it you wouldn’t support turning the 1934 or 1933 Federal securities act claims over to State courts. I mean, there is a place for a national standard, I take it, at least in some areas. MR. PAINTER. Well, yes.”).

objectives in enacting SLUSA was to preclude certain state law claims “to limit the conduct of securities class actions under State law.”¹⁹³ But the fact that this was one of Congress’s multiple objectives — one it achieved by promulgating Section 16(b) in SLUSA § 101(a)(1) — does not mean that Congress did not also intend to divest state courts of concurrent subject-matter jurisdiction over securities class actions under federal law — a separate goal that Congress achieved by promulgating the separate Jurisdictional Amendment in SLUSA § 101(a)(3)(A). Had Congress intended to enact the paradoxical result that these opponents claim — that while securities class actions that allege state law claims are removable to federal court, class actions that allege only federal law claims must remain in state court — one would expect it to have been mentioned somewhere in the legislative record.¹⁹⁴ Yet nowhere in the record does any Senator or Representative ever make any such mention or evidence any understanding that SLUSA was intended to achieve this illogical result.¹⁹⁵

This is unsurprising. In the seventeen years since SLUSA has been enacted, not a single court or commentator has been able to offer a cogent reason for why Congress would have enacted a system in which securities class actions that allege state law claims can be removed to federal court, but class actions that allege only federal law claims should be consigned to state court.¹⁹⁶ Instead, they are forced to concede that this result makes no sense. As one court noted in 2007:

193. H.R. Rep. 105-640, at 1 (1998).

194. See Snyder, *supra* note 8, at 695 (“[N]owhere did a Senator note an exemption from the removal authority for class actions alleging violations of only the Securities Act. Such an awkward exception to the implementation of ‘federal standards’ would surely have been mentioned.”).

195. See *id.*; cf. Costa, *supra* note 8, at 1219-20 (arguing that SLUSA allows for Exclusively Federal Securities Class Actions to be brought in state court and bars their removal to federal court, but being forced to acknowledge that “there are statements elsewhere in SLUSA’s legislative history that tend to support removal” and that “[r]emoval would help eliminate the possibility that the effectiveness of federal securities class action reform would be undermined by inconsistent state court adjudications of federal claims”).

196. One commentator speculates that the Republican majority in Congress at the time SLUSA was enacted “was generally concerned with federalism, and with ‘returning authority to the states.’” This commentator argues that this Republican Congress supported passing SLUSA with a provision that allowed for removal of class actions with state law claims but would not have supported allowing removal of Exclusively Federal Securities Class Actions, as “contract[ing] the authority of the state judiciary in favor of augmenting that of the federal judiciary was unpopular in th[at] political climate.” See Costa, *supra* note 8, at 1222-23 (arguing that Exclusively Federal Securities Class Actions should proceed in state courts). This argument is based on a fundamental misunderstanding of the legislative environment surrounding SLUSA’s passage. Congressional Republicans, including “states’ rights” Republicans, were the ones who were more strongly in *favor* of shifting securities and class action litigation from state courts to federal court in SLUSA, as they were with the PSLRA three years earlier and CAFA seven years later. See Vario, *supra* note 181, at 1561,

[G]iven the intent of SLUSA, it just makes no sense to prohibit the removal of federal securities class actions to federal court. Such a prohibition would permit the sort of end run around the PSLRA that SLUSA attempted to stop. It is inconceivable to me that the drafters of the Act intended such an outcome.

. . . . Certainly, Congress's desire to create a unified national standard for securities class actions cannot be met if fifty different state jurisdictions now become the official, and perhaps exclusive, interpreters of a federal statute. . . .

Further, . . . the result will also create a tremendous burden on state-court systems that are already beleaguered with heavy dockets and scarce resources. . . . [State] courts will be tasked with mastering a very specialized and complex area of federal law in which they traditionally have had no experience. By requiring state courts to interpret this federal law and to preside over cases brought pursuant to it, Congress will have imposed an enormous unfunded mandate on these courts to do the work that Congress should have its own courts do.¹⁹⁷

In short, the legislative history and purpose of SLUSA strongly supports the argument that Congress intended to include Exclusively Federal Securities Class Actions in SLUSA's remedies, and nothing in the legislative history evidences a clear intent to exclude them, nor would such exclusion make any sense in light of SLUSA's overall purpose: to prevent plaintiffs from circumventing the PSLRA.

VI. THE CONFUSION OVER SECTION 16(C)

As noted above, there is a continuing split in the case law regarding the treatment of Exclusively Federal Securities Class Actions. As *Knox* explains, the proper way to address this question is to determine whether state courts can retain jurisdiction over Exclusively Federal Securities Class Actions after SLUSA's Jurisdictional Amendment; if they do not, such

1606 (remarking on the apparent irony of Republican states' rights legislators consistently supporting SLUSA and its expansion of federal jurisdiction over state court claims). Additionally, this commentator's reading — that cases alleging *state* law, as opposed to Exclusively Federal Securities Class Actions, are the ones that should be removed from state courts — is actually the reading that is more offensive to federalism. *See supra* Part IV.

197. *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02391-JEC, 2007 WL 2729011, at *9-10, 2007 U.S. Dist. LEXIS 68513, at *28-31 (N.D. Ga. Sept. 14, 2007) (citations omitted). Notwithstanding the above, the *Unschuld* court reluctantly remanded the case before it based on a misunderstanding of *Kircher*, as discussed below. *See infra* Part VI.

actions are removable under 28 U.S.C. § 1441(a). While *Luther* and its progeny split from *Knox* in this interpretation — and, as described above, these cases cannot offer a logically coherent alternative without running roughshod over the Supreme Court’s holding in *Kircher*¹⁹⁸ — they at least address the correct issue on the merits.

But many cases fail to address this issue at all. Indeed, the main cause of this conflict within the case law is not a debate over *Knox*’s or *Luther*’s interpretation of SLUSA’s Jurisdictional Amendment; it is the fact that the majority of courts do not ask the jurisdictional question at all. Instead, they have focused on the wrong provision of SLUSA — the separate Section 101(a)(3)(B) (the “Removal Bar Amendment”) — which amended the Securities Act’s Removal Bar to read: “*Except as provided in section 77p(c) of this title* [Section 16(c) of the Securities Act], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”¹⁹⁹

The assumption underlying the focus on the Removal Bar Amendment is this: many courts simply assume that the Removal Bar applies to all actions alleging Securities Act claims, without recognizing that the Removal Bar applies only to cases brought in state courts “of competent jurisdiction.”²⁰⁰ These courts therefore jump straight to examining the new exception that the Removal Bar Amendment adds without first asking whether the Removal Bar applies to begin with. The Removal Bar Amendment has a cross-reference to Section 16(c), and Section 16(c) in turn cross-references Section 16(b). Many courts therefore simply begin and end their analysis on these two sections. The fixation on Sections 16(b) and 16(c) has led to considerable confusion.

The first two courts to address this issue in connection with Exclusively Federal Securities Class Actions immediately disagreed over what Section 16(c) allows. The first held that the Removal Bar Amendment and Section 16(c) permitted the removal of Exclusively Federal Securities Class Actions,²⁰¹ before reversing itself sua sponte three weeks later to hold that Exclusively Federal Securities Class Actions are *not* removable under Section 16(c).²⁰² The second held that Exclusively Federal Securities Class Actions *are* in fact removable under Section

198. See *supra* Part III.C.

199. 15 U.S.C. § 77v(a) (language added by SLUSA’s Removal Bar Amendment emphasized).

200. See, e.g., *Luther I*, 2008 U.S. Dist. LEXIS 26534, at *10; *Luther II*, 533 F.3d at 1033.

201. *Miller v. Waste Mgmt., Inc. (In re Waste Mgmt., Inc. Sec. Litig.)*, No. H-01-4381, 2002 WL 32107927, at *1, 2002 U.S. Dist. LEXIS 3460, at *3-4 (S.D. Tex. Jan. 23, 2002) (*Miller I*), *rev’d on reconsideration*, 194 F. Supp. 2d 590 (S.D. Tex. 2002) (*Miller II*).

202. *Miller II*, 194 F. Supp. 2d at 591.

16(c).²⁰³ A multitude of subsequent courts further perpetuated this chaos.²⁰⁴ And because these decisions were not appealable, due to 28 U.S.C. § 1447(d), no appellate court was able to resolve this profound disagreement among the lower courts.²⁰⁵

203. Brody v. Homestore, Inc., 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003).

204. Compare Bernd Bildstein IRRA v. Lazard Ltd., No. 05 CV 3388 RJDRML, 2006 WL 2375472, at *1, 2006 U.S. Dist. LEXIS 61395, at *2-4 (E.D.N.Y. Aug. 15, 2006) (holding removal is impermissible under Section 16(c)), Pipefitters Local 522 & 633 Pension Trust Fund v. Salem Commc'ns Corp., No. CV 05-2730-RGK (MCx), 2005 WL 6963459, at *2-3, 2005 U.S. Dist. LEXIS 14202, at *6-7 (C.D. Cal. June 28, 2005) (same), Higginbotham v. Baxter Int'l, Inc., Nos. 04 C 4909, 04 C 7906, 2005 WL 1272271, at *2-3, 2005 U.S. Dist. LEXIS 12006, at *6-7 (N.D. Ill. May 25, 2005) (same), Zia v. Med. Staffing Network, Inc., 336 F. Supp. 2d 1306, 1308-10 (S.D. Fla. 2004) (same), Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distribution, Inc., No. 8:04-cv-961-T-26MAP, 2004 WL 6246913, at *2, 2004 U.S. Dist. LEXIS 32014, at *5-6 (M.D. Fla. June 25, 2004) (same), *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116, 121-22 (D.N.H. 2004) (same), Williams v. AFC Enters., Inc., No. CIVA 103-CV-2490-TWT, 2003 WL 24100302 at *2-4, 2003 U.S. Dist. LEXIS 28623, at *6-10 (N.D. Ga. Nov. 20, 2003) (*Williams I*) (same, although noting that this result “just makes no sense”), *appeal dismissed for want of jurisdiction*, 389 F.3d 1185 (11th Cir. 2004) (*Williams II*), Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp., No. 03CV0714BTM(JFS), 2003 WL 23509312, at *2, 2003 U.S. Dist. LEXIS 15832, at *4-6 (S.D. Cal. Aug. 27, 2003) (same, although noting that “there are statements of members of Congress that are consistent with an intent to authorize the removal of *all* covered class actions involving covered securities . . . including class actions arising under the Securities Act”) (emphasis added), Martin v. BellSouth Corp., No. 1:03-CV-728-WBH, 2003 WL 26476752, at *2-3, 2003 U.S. Dist. LEXIS 28605, at *5-8 (N.D. Ga. July 3, 2003) (same), and Nauheim v. Interpublic Grp. of Cos., No. 02-C-9211, 2003 WL 1888843, at *3, 5, 2003 U.S. Dist. LEXIS 6266, at *10-11, 17 (N.D. Ill. Apr. 16, 2003) (same, holding that the Removal Bar “prohibit[s] removal of any ‘case arising under this subchapter and brought in any State court . . . except as provided in section [16](c) of this title’” and holding removal impermissible under Section 16(c), while overtly ignoring the Removal Bar’s “of competent jurisdiction” limitation) (ellipsis and omission in original), with Purowitz v. DreamWorks Animation SKG, Inc., No. CV 05-6090 MRP (VBKx), 2005 WL 6794770, at *2-3, 2005 U.S. Dist. LEXIS 46911, at *5-7 (C.D. Cal. Nov. 15, 2005) (holding removal permissible under Section 16(c)), Lowinger v. Johnston, No. 3:05CV316-H, 2005 WL 2592229, at *4, 2005 U.S. Dist. LEXIS 44720, at *10-13 (W.D.N.C. Oct. 13, 2005) (same), *In re King Pharm., Inc.* 230 F.R.D. 503, 504-05 (E.D. Tenn. 2004) (same), Kulinski v. Am. Elec. Power Co., Inc., No. C-2-03-412, 2003 WL 24032299, at *1, 2003 U.S. Dist. LEXIS 26447, at *4 (S.D. Ohio Sept. 19, 2003) (report and recommendation) (same), *adopted*, slip op. (S.D. Ohio Jan. 7, 2004), ECF No. 31, and Alkow v. TXU Corp., No. 3:02-2738-K, 3:02-CV-2379-K, 2003 WL 21056750, at *2-3, 2003 U.S. Dist. LEXIS 7900, at *6 (N.D. Tex. May 8, 2003) (same). Commentators similarly focused on Section 16(c) and were no less split. Compare Costa, *supra* note 8, at 1216-17 (focusing on Section 16(c) and arguing that removal is impermissible), with Cook, *supra* note 24, at 647-52 (focusing on Section 16(c) and arguing that removal is permissible).

205. See Kircher v. Putnam Funds Trust, 547 U.S. 633, 640-42 (“[W]here the [remand] order is based on one of the grounds enumerated in 28 U.S.C. § 1447(c), review is unavailable no matter how plain the legal error in ordering the remand.” (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977))) (internal brackets omitted); *Williams II*, 389 F.3d at 1191 (dismissing appeal of *Williams I* for want of jurisdiction, as “[t]he district court’s

Ironically, the Supreme Court's decision in *Kircher* only worsened the confusion. As described above, *Kircher*'s central holding is that state courts retain jurisdiction over the state claims described in Section 16(b).²⁰⁶ But not a single case examining the removability of Exclusively Federal Securities Class Actions has ever focused on *Kircher*'s jurisdictional holding. Numerous courts have instead fixated a passage of dictum in *Kircher* that addresses removability under Section 16(c) and suggests that the only actions removable under Section 16(c) are those with claims precluded by Section 16(b), i.e., state law claims.²⁰⁷ But which actions are removable under Section 16(c) is irrelevant to Exclusively Federal Securities Class Actions because they are removable under 28 U.S.C. § 1441(a) and hence have no need of Section 16(c).²⁰⁸ Nonetheless, subsequent courts began erroneously using the dictum in *Kircher* to decide whether Exclusively Federal Securities Class Actions, which by definition

interpretation of SLUSA, erroneous or not, is not reviewable under § 1447(d)”) (citations omitted).

206. See *supra* Part III.C.3.

207. See *Kircher*, 547 U.S. at 643-44 (“[S]ubsection (c) is understood to be restricted to precluded actions defined by subsection (b) If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it.”). But this passage was not directed to Exclusively Federal Securities Class Actions. Rather, it was addressed to actions alleging only state law claims for which there was *no basis for federal subject-matter jurisdiction* other than SLUSA. See *id.* at 637, 641-42 & n.10 (holding that there was no other ground, e.g., diversity, for federal subject-matter jurisdiction over the actions at issue). If the only possible basis for federal subject-matter jurisdiction of a *purely state law claim* is in SLUSA and Sections 16(b) and 16(c), then only those actions that fall within the scope of those subsections can be removed to federal court, as the federal court would otherwise have no subject-matter jurisdiction. On the other hand, actions for which there is a separate and independent basis for federal subject-matter jurisdiction, such as claims under the federal securities laws, and which can be removed under 28 U.S.C. § 1441(a), do not depend on SLUSA for federal subject-matter jurisdiction. Further, as Justice Scalia points out, this passage in *Kircher* is properly understood as dictum even with respect to actions alleging state law claims. See *id.* at 650 (Scalia, J., concurring in part and concurring in the judgment) (“It seems to me no more within our authority to declare the District Court’s views correct than it was within the Court of Appeals’ authority to reject them. Either decision is an exercise of appellate review barred by the plain terms of § 1447(d).”).

208. See *Wunsch v. Am. Realty Capital Props.*, No. JFM-14-4007, 2015 WL 2183035, at *1, 2015 U.S. Dist. LEXIS 48759, at *1 (D. Md. Apr. 14, 2015) (“Section [16](c) is not relevant [to Exclusively Federal Securities Class Actions] because the asserted claims do not arise under state law.”); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 423, 425 (S.D.N.Y. 2009) (holding that no state court has competent jurisdiction over Exclusively Federal Securities Class Actions); *accord Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC et al., 2012 WL 3647409, at *3, 2012 U.S. Dist. LEXIS 119924, at *22-23 (N.D. Cal. Aug. 23, 2012).

have no state law claims precluded by Section 16(b), are also not removable under Section 16(c).²⁰⁹ They could not agree on the answer.²¹⁰

209. The dictum in *Kircher* that “subsection [16](c) is understood to be restricted to precluded actions defined by subsection (b),” 547 U.S. at 643-44, is irrelevant if defendants *expressly disclaim* any reliance on Section 16(c) for removal and rely solely on SLUSA’s Jurisdictional Provision and 28 U.S.C. § 1441(a).

210. *Compare* Plymouth Cnty. Ret. Sys. v. Model N., Inc., No. 14-cv-04516-WHO, 2015 WL 65110, at *3, 2015 U.S. Dist. LEXIS 1104, at *10 (N.D. Cal. Jan. 5, 2015) (“The [Supreme] Court stated [in *Kircher*] that ‘authorization for removal in [Section 16](c) . . . is confined to cases set forth in [section 16](b).’”) (emphasis added, internal brackets omitted), *Young v. Pac. Biosci. of Cal., Inc.*, No. 5:11-cv-05668 EJD, 2012 WL 851509, at *3-4, 2012 U.S. Dist. LEXIS 33695, at *8-12 (N.D. Cal. Mar. 13, 2012) (“[T]he court interprets [Section 16](c) as the Supreme Court did in *Kircher*: only those ‘covered class actions’ described in [Section 16](b) alleging omission or deception based upon *state law* are removable.”) (first emphasis added, second emphasis in original), *W. Va. Laborers Trust Fund v. STEC, Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 WL 6156945, at *3-5, 2011 U.S. Dist. LEXIS 146846, at *8-14 (C.D. Cal. Oct. 7, 2011) (“[B]ecause this case is not precluded under subsection (b), it is not removable *under subsection (c)*.”) (emphasis added), *W. Palm Beach Police Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 WL 1099815, at *2, 2011 U.S. Dist. LEXIS 30607, at *4-6 (S.D. Cal. Mar. 24, 2011) (citing *Kircher* to hold that “any suit removable under SLUSA’s removal provision, [section 16](c), is precluded under SLUSA’s preclusion provision, [section 16](b), and any suit not precluded is not removable” and therefore holding that Exclusively Federal Securities Class Actions are not removable under Section 16(c)) (emphasis added), *Parker v. Nat’l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972, at *6, 2009 U.S. Dist. LEXIS 132947, at *16 (N.D. Ohio Feb. 12, 2009) (“Since § [16](b) limits removal jurisdiction to class actions involving state law claims and Plaintiffs in the instant action have asserted only federal claims, the court finds that *Kircher* weighs in favor of finding that jurisdiction over this matter is lacking.”) (emphasis modified), *Layne v. Countrywide Financial Corp.*, 2008 WL 9476380, at *1, 2008 U.S. Dist. LEXIS 123896, at *3 (C.D. Cal. July 8, 2008) (*Layne I*) (citing *Kircher* and “conclud[ing] that it must remand”), and *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02391-JEC, 2007 WL 2729011, at *9-11, 2007 U.S. Dist. LEXIS 68513, at *28-34 (N.D. Ga. Sept. 14, 2007) (citations omitted) (citing *Kircher* as a “tiebreaker” in holding that Exclusively Federal Securities Class Actions are not “within the group of cases that [Sections 22](a) and [16](c) permit to be removed,” although noting that this result “just makes no sense”) (emphasis added), *with* *Brady v. Kosmos*, Nos. 3:12-CV-373-B, 3:12-cv-0781-B, 2012 WL 6204247, at *1 & n.2, 2012 U.S. Dist. LEXIS 176567, at *5-6 & n.2 (N.D. Tex. July 10, 2012) (holding after *Kircher* that “the authorities finding that removal [of Exclusively Federal Securities Class Actions] is proper” are more convincing and “consistent with Congress’s broad goal of making federal court the ‘exclusive venue’ for the bulk of securities class actions”) (internal quotation marks omitted), *Northumberland Cnty. Ret. Sys. v. GMX Res., Inc.* 810 F. Supp. 2d 1282, 1286-87 (W.D. Okla. 2011) (holding that *Kircher* and legislative history establish that Section 16(c) allows removal of Exclusively Federal Securities Class Actions), and *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964 (ERK), 2007 WL 778485, at *4-5, 2007 U.S. Dist. LEXIS 17671, at *13-19 (E.D.N.Y. Mar. 13, 2007) (holding that *Kircher* establishes that Section 16(c) allows removal of Exclusively Federal Securities Class Actions). Commentators as well split on the proper reading of *Kircher* regarding Section 16(c) removal of Exclusively Federal Securities Class Actions. *Compare* Butts, *supra* note 8 (arguing that *Kircher* establishes that only class actions with precluded state law claims as set forth in Section 16(b) are removable under Section 16(c)),

Unfortunately, many courts continue to view SLUSA's Jurisdictional Amendment only through the lens of the Removal Bar Amendment and Section 16(c), confusing and conflating these provisions even though they are separate and distinct. One of the most recent of these cases begins to consider the Jurisdictional Amendment and its use of the phrase "except as provided in Section [16]," but then suddenly shifts and focuses on the Removal Bar Amendment and its use of the phrase "except as provided in Section [16](c)," without recognizing that it is referring to two different SLUSA amendments.²¹¹ But this decision is only the latest of a line of cases that conflate the Jurisdictional Amendment — SLUSA § 101(a)(3)(A) — with the Removal Bar Amendment — SLUSA § 101(a)(3)(B).²¹²

While courts have often assumed that the Jurisdictional Amendment and the Removal Bar Amendment are interrelated, there is nothing in the text of SLUSA linking these two amendments. They were passed in two different and co-equal sections of SLUSA — Section 101(a)(3)(A) versus Section 101(a)(3)(B) — and both must be read as having some independent effect.²¹³ Neither amendment cross-references the other. Nor are the amendments linked through a common cross-reference to a third statutory provision. The Removal Bar Amendment includes a cross-reference to Section 16, *subsection (c)*, of the Securities Act. The Jurisdictional Amendment does *not* — it cross-references Section 16 as a whole. Under ordinary rules of statutory construction, "when the legislature uses certain language in one part of the statute and different language in another . . .

with Snyder, supra note 8, at 683-93 (arguing that all covered class actions are removable under Section 16(c)). None of these cases address whether, separate from Section 16(c), Exclusively Federal Securities Class Actions are removable under 28 U.S.C. § 1441(a).

211. *Desmarais v. Johnson*, Nos. C 13-03666 WHA et al., 2013 WL 5735154, at *3, 2013 U.S. Dist. LEXIS 153165, at *10 (N.D. Cal. Oct. 22, 2013) (emphasis added, internal brackets omitted).

212. *See Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 WL 5596965, at *1, 2013 U.S. Dist. LEXIS 147569, at *3-4 (N.D. Cal. Oct. 11, 2013) (citing the separate amendments effected by SLUSA § 101(a)(3)(A) and SLUSA § 101(a)(3)(B) without distinguishing them); *Reyes v. Zynga, Inc.*, No. C 12-05065 JSW, 2013 WL 5529754, at *3, 2013 U.S. Dist. LEXIS 146465, at *9-10 (N.D. Cal. Jan. 23, 2013) (citing Section 22(a) generally without distinguishing between the Jurisdictional Provision and SLUSA § 101(a)(3)(A)'s amendment thereto, and the Removal Bar and SLUSA § 101(a)(3)(B)'s amendment thereto).

213. *See, e.g., Dunn v. CFTC*, 519 U.S. 465, 472 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."); *Newby v. Enron Corp.*, 338 F.3d 467, 473 (5th Cir. 2003) (holding in the context of PSLRA amendments to federal securities laws that where "[s]ubsection (b), which is equal in rank to subsection (a), is separate and distinct from subsection (a)," the terms of one subsection should not be read onto the other).

different meanings were intended.”²¹⁴ Section 16(c) may be central to the understanding of the Removal Bar Amendment, but it has no facial bearing on the interpretation of the Jurisdictional Amendment or the Securities Act’s Jurisdictional Provision.²¹⁵

CONCLUSION

SLUSA’s Jurisdictional Amendment — Section 101(a)(3)(A) — clearly divests state court of jurisdiction over some category of actions. The most natural reading of the Jurisdictional Amendment’s text, as explained in *Knox*, is that this category consists of Exclusively Federal Securities Class Actions. This reading is also consistent with the Supreme Court’s holding in *Kircher*, which establishes that the Jurisdictional Amendment does *not* divest state courts of jurisdiction over class actions asserting state law claims, and is the only reading that comports with the legislative history and purpose of SLUSA — that all securities class actions should be litigated in the federal courts — and the precepts of federalism.

214. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting A. N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th rev. ed. 2000)).

215. What, then, is the purpose of the Removal Bar Amendment? The Removal Bar Amendment revises the Removal Bar, which applies only to cases that allege federal Securities Act claims, but the Removal Bar Amendment cross-references Section 16(c), which in turn cross-references Section 16(b), which addresses state law claims. The actions affected by the Removal Bar Amendment must therefore be class actions that allege *both* federal Securities Act claims and state law claims. The reason why the Removal Bar Amendment is necessary in addition to the Jurisdictional Amendment is this: while the Jurisdictional Amendment can clearly divest state courts of jurisdiction over class actions alleging only federal Securities Act claims, *see, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 758 (2009), it is not clear that the Jurisdictional Amendment can fully divest state courts of jurisdiction over class actions alleging *both* federal and state law claims. *See supra* Part IV. The Removal Bar Amendment “thus was needed to eliminate any doubt about the removability of cases that include both state law claims and . . . claims based on the Securities Act,” *In re Tyco Int’l, Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004) — even if state courts retain jurisdiction over such cases, they can be removed to federal court.