

[Securities Regulation Daily Wrap Up, FEDERAL PREEMPTION—U.S.: Cert petition asks whether PSLRA discovery applies in state court, \(May 6, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

Does the PSLRA discovery stay which applies to "any private action" arising under the Securities Act apply in state as well as federal courts?

A petition for certiorari asks the Supreme Court to take up the question of whether the PSLRA discovery stay applies to Securities Act cases brought in state court. The petitioners argue that the provision applies to *any* private action, just like it says, no matter if brought in state or federal court. The state trial courts, however, are split on the issue, with some insisting that the provision only applies in the federal courts. The petition says that since there is no viable path for appellate review of this question, the Court should take the opportunity to clarify the matter. A response is due on June 4, 2021 ([Pivotal Software, Inc. v. Tran](#), May 3, 2021).

PSLRA discovery stay. The PSLRA discovery stay, Securities Act Section 27(b)(1), provides for the automatic stay of all discovery during the pendency of a motion to dismiss stage unless the presiding court finds that particularized discovery is necessary. The petition notes that the discovery stay provision states that it applies to "any private action" arising under the Securities Act. The petitioners say that despite this "plain language" state courts are divided as to whether the stay applies to Securities Act suits brought in state court or just to suits brought in federal court. This divide has deepened since the 2018 [Cyan](#) decision holding that state courts have concurrent jurisdiction over Securities Act claims and the subsequent increase in those claims being filed in state courts.

Before the state court. The petitioner, the provider of a cloud-based software platform, completed an IPO in April 2018. A little over one year later, Pivotal lowered its going-forward guidance, leading to a drop in stock price and the filing of a number of securities class actions. The petition notes that a consolidated [federal action](#) proceeded first and was dismissed for failure to state a claim after the court found that the complaint failed to plausibly allege that the challenged statements in Pivotal's registration statement were misleading.

The action at issue was filed in the California Superior Court and, like the federal action, challenged statements made in the IPO registration statement. The plaintiffs sought discovery, asserting that the PSLRA discovery stay did not apply in state court, and the court denied Pivotal's request for the stay. The plaintiffs then began to serve Pivotal (and each of the other 25 petitioners) with what the petition describes as requests that were "as broad and burdensome as they come" before the trial court determined if the complaint even states a claim. A formal motion to stay discovery was then denied by the trial court, which concluded that the provision only applied in federal courts, in part due to the lack of express references to state courts in the text. The California appellate and Supreme Court both summarily denied relief.

State courts are split. According to the petition, state courts are split over whether the PSLRA discovery stay applies to them. The issue has also consistently evaded appellate review since the issue arises during a stage not reviewable after final judgment, and, moreover, the disputes and orders are often unreported. The petition lists a number of cases on both sides of the argument: courts applying the stay reason that the plain language and purpose of the provision apply to equally to state and federal courts, while those declining the stay reason that doing so would undermine *Cyan* and that the provision is of a procedural nature only applicable to federal courts. In the 25 years since the enactment of the PSLRA, the petition states, no state appellate court has considered this matter, and it is time for the Supreme Court to step in.

The state court is wrong. The petition argues that the tools of statutory construction show that the discovery stay applies in both state and federal courts. The petitioners first argue that the word "any" in the phrase "any private action" means *any* action regardless of venue. If Congress meant to stay discovery only in federal courts, it would have said so, and Congress would surely have meant to prevent the abuses that led to the PSLRA in state courts as well as federal. The trial court's reading of the stay provision is "atextual" and "wrong," the petition maintains and is not supported by the holding in *Cyan*.

The petition is [No. 20-1541](#).

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Companies: Pivotal Software, Inc.

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