No. 24-6600

In the United States Court of Appeals for the Ninth Circuit

STEPHEN ROSSI

AND

KIM STEVENSON ET AL.,
Plaintiffs-Appellants,

V.

GREGORY BECKER, ET AL.,
Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California, in D.C. Cases:
Rossi v. Becker, No. 4:23-cv-02335-HSG and *Stevenson v. Becker*,
No. 4:23-cv-02277-HSG, before the Hon. Haywood S. Gilliam, Jr.

MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, *amicus curiae* The Securities Industry and Financial Markets Association states that it is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: March 31, 2025

/s/ Todd G. Cosenza
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Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Circuit Rule 29-3, the Securities Industry and Financial Markets Association ("SIFMA") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of Defendants-Appellees in this pending interlocutory appeal. Counsel for SIFMA provided all parties with timely notice of SIFMA's intent to file an *amicus curiae* brief on March 10, 2025. That same day, Defendants-Appellees' counsel consented to this filing. On March 11, 2025, counsel for Plaintiffs-Appellants stated that they did not consent. Accordingly, SIFMA "endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief." Cir. R. 29-3.

SIFMA has a strong interest in the issue before this Court concerning federal jurisdiction over private securities actions under the Securities Act of 1933 (the "Securities Act") that relate to bankruptcy. *See* Fed. R. App. 29(a)(3)(A). SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA members routinely face private securities actions under the Securities Act, including in their capacity as underwriters of debt and equity that are indemnified by issuers that may later go bankrupt. These actions impose significant burdens and costs on SIFMA members, which affect access to capital markets and raise costs for American businesses of all sizes. The issue in this case is therefore highly relevant to SIFMA members and to SIFMA's goal of promoting fair and efficient markets.

The issue in this case also implicates the uniformity and predictability in the application of the Securities Act and federal bankruptcy system upon which SIFMA and its members rely. Through this *amicus curiae* brief, SIFMA will be able to provide this Court with additional legal and policy arguments that "are relevant to the disposition of the case." Fed. R. App. 29(a)(3)(B).

No party or counsel for a party authored the accompanying brief in whole or in part, and no entity or person, aside from SIFMA, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the accompanying brief. SIFMA does not have any direct interest, financial or otherwise, in the outcome of this case.

For the foregoing reasons, SIFMA respectfully requests that it be granted leave to file the accompanying *amicus curiae* brief.

March 31, 2025

Respectfully submitted,

/s/ Todd G. Cosenza

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CERTIFICATE OF SERVICE

I, Todd G. Cosenza, hereby certify that on March 31, 2025, I caused the foregoing Brief of *Amicus Curiae* SIFMA to be filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 31, 2025

/s/ Todd G. Cosenza
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STATEMENT OF INTEREST[1]

The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of industry members and their one million employees, SIFMA advocates on legislation, regulations, and business policies affecting retail and institutional investors, equity and fixed-income markets, and related products and services. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA regularly files amicus briefs in actions arising under the federal securities laws, including in *Hunt v. PricewaterhouseCoopers LLP*, No. 24-3568 (9th Cir. Dec. 2, 2024), *Facebook, Inc. v. Amalgamated Bank*, No. 23-980 (U.S. Aug. 16, 2024), *Pirani v. Slack Technologies, Inc.*, No. 20-16419 (9th Cir. Nov. 15, 2021), and *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015).

SIFMA has a substantial interest in this action because of the significant burdens imposed on its members by private securities class actions, which affects

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund preparing or submitting this brief. No person other than SIFMA or its counsel made a monetary contribution to the preparation or submission of this brief.

access to capital markets and raises costs for American businesses of all sizes. The issues in this action are directly relevant to SIFMA's goal of promoting fair and efficient markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, which is undisputedly related to the bankruptcy of SVB Financial Group ("SVB"), was properly removed to federal court. Although the Securities Act of 1933, 15 U.S.C. § 77a, *et seq*. (the "Securities Act" or "1933 Act"), generally bars removal to federal court of class action lawsuits filed in state court asserting claims under the Securities Act, 15 U.S.C. §§ 77v(a), 77p(c), the removal bar does not apply where, as here, an action relates to a bankruptcy. The Bankruptcy Code expressly and without exception permits removal to federal court of all claims "related to" bankruptcy cases. 28 U.S.C. §§ 1334(b), 1452(a).

Relying on the Second Circuit's opinion in *California Public Employees' Retirement System v. WorldCom, Inc.*, 368 F.3d 86, 108 (2d Cir. 2004), the District Court correctly held that "'generally nonremovable claims brought under the Securities Act of 1933 may be removed to federal court if they come within the purview of 28 U.S.C. § 1452(a).'" (1-ER-17 (quoting *WorldCom*, 368 F.3d at 108).) This Court should join the Second Circuit and affirm so that Securities Act claims related to bankruptcies can continue to be removed to federal court. Doing otherwise would violate § 1334(b) and frustrate the very purpose of the federal bankruptcy scheme, which is to channel related claims to the federal court system. Otherwise, defendants and the courts will be faced with needlessly duplicative and piecemeal litigation arising out of a common sets of facts, resulting in significant inefficiency and inconsistent adjudications of identical questions. Notably, there are *no* offsetting benefits to barring removal of Securities Act class actions related to a bankruptcy, and Plaintiffs-Appellants do not seriously argue otherwise.

When a corporate issuer of securities, such as SVB, files for bankruptcy, a Securities Act class action takes on a different tenor because the issuer is typically not available as a defendant and source of recovery for the class. *See, e.g.*, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, Case No. H-01-3624 (S.D. Tex. Oct. 22, 2001); *In re WorldCom, Inc. Sec. Litig.*, Case No. 02-cv-3288 (S.D.N.Y. Apr. 30, 2002). That usually means that other participants in the process of raising capital through public securities offerings, such as broker-dealers acting as securities underwriters and individual directors, become the principal litigation targets. *Id.* These litigation risks—which entail strict liability (subject to due diligence defenses)—increase the cost of capital for companies seeking to access the U.S. public securities markets, which limit economic growth. *See, e.g.*, U.S. Chamber of Commerce, *Commission on the Regulation of U.S. Capital Markets in the 21st Century: Report and Recommendations* (Mar. 2007); Committee on Capital Markets, *Interim Report of the Committee on Capital Markets Regulation* (Nov. 30, 2006); U.S. Chamber Institute for Legal Reform, *An Update on Securities Litigation* (Mar. 2020).

Compounding these costs by rejecting removal to federal court in otherwise removable cases "related to" bankruptcy is neither legally correct nor beneficial to markets, litigants, or courts. Indeed, companies facing financial challenges are often the most in need of affordable investor capital. Stripping their securities underwriters of their statutory right to remove cases to federal court in the event of a bankruptcy will only make raising that capital more expensive.

An additional consideration is underwriter indemnity. It is industry standard for issuers to agree to indemnify underwriters against Securities Act claims because they relate to disclosures about the issuer, including paying legal expenses as they are incurred and funding settlements. Indemnification is thus an essential part of any underwriting agreement. For decades, in accepting underwriter assignments, investment banks have consistently relied on *WorldCom* and similar rulings in other circuits for the proposition that, if the issuer files for bankruptcy, they will be able to remove any Securities Act litigation to federal court. This reliance has been especially important since it is often impossible to recover on indemnities from corporate issuers that have filed for bankruptcy because of insufficient funds. If the Ninth Circuit departs from the widely relied upon reasoning of *WorldCom*, such a circuit split will disrupt the prevailing understanding of participants in the crucial capital-raising process for U.S.-listed companies, including in this Circuit, that serve the public and drive innovation.

These are not theoretical concerns. If defendants in Securities Act class actions cannot remove them to federal court, then underwriters may be forced to litigate substantially similar cases in different states, and parallel cases in state and federal court, without any coordination across cases or with any bankruptcy proceedings. This obviously risks conflicting rulings. It also leads to duplicative legal work and higher litigation costs that ultimately fall on the bankrupt issuer (and therefore its creditors) through indemnification.

Requiring piecemeal litigation of Securities Act claims in state court also undermines the federal bankruptcy scheme. "[J]urisdiction and authority over bankruptcy has been vested, from the beginning of the Republic, in the federal district courts" so that "they might deal efficiently and expeditiously with ***all matters*** connected with the bankruptcy estate." *Gruntz v. Cty. of L.A. (In re Gruntz)*, 202 F.3d 1074, 1080 (9th Cir. 2000) (en banc) (emphasis added; cleaned up). This includes indemnification claims by underwriters facing Securities Act litigation *both* for litigation expenses as incurred and any settlements, which can be ***hundreds of millions of dollars***. (*See infra* Section II.A (collecting cases).) Permitting state courts to adjudicate Securities Act claims that impact obligations on the bankruptcy estate "would undermine the principle of a unified federal bankruptcy system, as declared in the Constitution and realized through the Bankruptcy Code." *Gruntz*, 202 F.3d at 1083–84. It also forces underwriters to litigate claims in state court and bring separate claims against the debtor asserting indemnification in bankruptcy court, at which point there may not be sufficient funds or insurance proceeds left to cover litigation expenses and settlement. These additional risks will make underwriters less likely to underwrite debt and equity offering for companies that may later go bankrupt and therefore decrease U.S. companies' access to capital.

By affirming the District Court's ruling that Securities Act claims related to bankruptcy cases are removable to federal court, this Court will rule correctly and also ensure consistency across circuits, allowing companies to go public and affordably raise capital in the nationwide securities market.

BACKGROUND

The role of an underwriter in a debt or equity offering is to assume market risk. *See* Thomas Lee Hazen, THE LAW OF SECURITIES REGULATION 72–75 (8th ed. 2021). Underwriters act as financial intermediaries in debt and equity offerings, such as initial public offerings, by pricing securities, purchasing them from the issuer, and reselling them to buyers. *Id.* at 70–75. Underwriters therefore hold the risk that the market will not buy the issuers' securities, such as if they are priced too high or if interest rates change. *Id.* at 73–75. Underwriters conduct reasonable due diligence into the issuer in connection with the offering; however, no underwriter is privy to all of the issuers' information and no underwriter does or has the ability to "guarantee the absolute accuracy of every statement" made by the issuer in the offering documents. H.R. Rep. No. 85, 73rd Cong., 1st Sess., 1933 WL 983, at *5 (May 4, 1933); *see also* SEC, "The Regulation of Securities Offerings," Securities Act Release No. 7606A, 1998 WL 792508, at *92 (Nov. 17, 1998).

Despite these limitations, underwriters are exposed to potential liability under the securities laws. Specifically, "Sections 11 and 12(a)(2) of the Securities Act of 1933 impose ***strict liability*** . . . for any 'untrue statement of a material fact or [omission of] a material fact' in a 'registration statement' or 'prospectus'" on "every underwriter with respect to [that offering]." *Pirani v. Slack Techs., Inc.*, 127 F. 4th 1183, 1186 (9th Cir. 2025) (quoting 15 U.S.C. §§ 77k(a), 77l(a)(2)) (emphasis added). Not surprisingly, in the over 200 actions filed from 2020 to 2024 asserting claims under Section 11 ("Section 11 Claims") and/or Section 12 of the Securities Act, over 44% of those actions named at least one underwriter as a defendant. Cornerstone Research, *Securities Class Action Filings – 2024 Year in Review* ("2024 Cornerstone Report"), 1, 4, 12.

For years, the industry-standard solution has been a commercial one: underwriters require issuers to agree to express provisions in any underwriting services agreement that provide robust indemnification and contribution rights in the event of securities litigation. *See, e.g.*, 1C Harold S. Bloomenthal & Samuel Wolff,

GOING PUBLIC AND THE PUBLIC CORPORATION § 14:135 (2024 ed.) ("It is also common for the underwriting agreement to provide that the issuer will agree to indemnify the underwriter for liabilities incurred by the underwriter in connection with the proposed financing including liabilities arising under the Securities Act."). The issuer typically agrees to pay for *both* legal fees and expenses incurred in the defense of securities claims, as well as *all* settlement consideration required to resolve the litigation. *See, e.g.*, 17 J. William Hicks, CIVIL LIABILITIES: ENFORCEMENT & LITIGATION UNDER THE 1933 ACT § 4:143 (2024 ed.) (collecting cases). Underwriters typically have established language regarding indemnification and contribution that they are reluctant to and almost never negotiate. Bloomberg Law, *Capital Markets, Drafting Guide – Underwriting Agreements: Indemnification and Contribution* (2025) ("The underwriters tend to be inflexible because, although the underwriters can rarely control the issuer's misstatements and omissions, the underwriters are typically the deep-pocket targets of investor lawsuits.").

Such provisions have historically proven effective for underwriters by providing the desired financial protection for underwriters facing securities claims. Not only can mounting a defense to securities litigation be costly and last several years, *see, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1546 (2006) (discussing "the high level of defense costs in securities litigation"), but the amount of potential damages—especially under the applicable statutory formulas, *see* 15 U.S.C. § 77k(e)—can easily exceed hundreds of millions of dollars, *see* 2024 Cornerstone Report, 18.[2]

According to an empirical analysis by Cornerstone Research—a leading economic consulting firm in securities litigation—there were over 100 Securities Act class actions filed in state courts alleging (in the aggregate) over $77 billion of losses to investors from 2019 to 2024. 2024 Cornerstone Report, 17–18. By contrast, Securities Act class actions filed in federal court during the same period alleged (in the aggregate) only approximately $50 billion of losses to investors. *Id.* at 18. Thus, from 2019 to 2024, the alleged losses in Securities Act class actions in state court were more than 50% higher (in the aggregate) than those in federal court. *Id.* Moreover, while the prevalence of the filing of Securities Act claims in state court declined in light of courts recognizing federal forum-selection provisions for such claims contained in corporate bylaws, *see, e.g.*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), nearly a quarter of all Securities Act claims were filed in state court in 2024, 2024 Cornerstone Report, 17, 19.

[2] Plaintiffs-Appellants' contention that "over the last 20 years," the conflict between the Bankruptcy Code and the Securities Act "has only cropped up in a handful of cases" (Pls.' Br. at 3; *see also id.* at 24) is simply not true and also beside the point (*see* Defs.' Br. at 13, 33–34, 41–42).

ARGUMENT

I. REQUIRING STATE COURT LITIGATION OF FEDERAL SECURITIES ACT CLAIMS WHERE BANKRUPTCY JURISDICTION EXISTS CREATES NEEDLESS INEFFICIENCIES AND RISKS WITH NO OFFSETTING BENEFIT TO THE JUDICIAL PROCESS.

Securities underwriters currently have well-founded confidence based on federal precedent that they will be able to remove any Securities Act litigation involving a bankrupt securities issuer because their indemnity rights cause the case to be "related to" bankruptcy. *See, e.g.*, *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 341–42 (2d Cir. 2018) (indemnification provision gives rise to "related to" jurisdiction even if the act giving rise to indemnification had not yet occurred); *Refinery Holdings Co., LP v. TRMI Holdings, Inc. (In re El Paso Refinery, LP)*, 302 F.3d 343, 348–49 (5th Cir. 2002) ("chain of indemnification provisions" that could be used to assert a claim against the debtor gives rise to "related to" jurisdiction); *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 489–94 (6th Cir. 1996) (potential claims for contribution and indemnification against debtor gave rise to "related to" jurisdiction); *A.H. Robins v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986) (litigation "related to" bankruptcy proceedings when brought against officers of debtor who may be entitled to indemnification under debtor's insurance policy).

This is also consistent with how courts (including in this Circuit) have interpreted and applied the removal statute, 28 U.S.C. § 1452(a). An action is "related to" a bankruptcy case, and therefore removable to federal court, if "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). It thus logically follows that "contribution or indemnification" rights against a bankrupt estate "confer[] jurisdiction over actions 'related to' bankruptcy," including where those rights pertain to a Securities Act claim. *PDG Los Arcos, LLC v. Adam*, 436 F. App'x 739, 742 (9th Cir. 2011) (citing *Fietz*, 852 F.2d at 457); (*see also* 1-ER-23 ("Numerous courts in the Ninth Circuit have concluded that a case is 'related to' a bankruptcy action where there is an indemnification agreement between the defendant in the case and a bankruptcy debtor, even if the defendant is not guaranteed indemnification.") (citing *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 447 B.R. 302, 310 (C.D. Cal. 2010))). For example:

- *Stichting* was a "securities action" under the 1933 Act involving mortgage-backed securities "backed by loans originated by American Home." 447 B.R. at 310. The court held that action was "related to the American Home bankruptcy because a defendant in the action had a contractual claim for indemnification against the debtor." *Id.*;

- In *FDIC v. Banc of America Sec. LLC*, the FDIC "as receiver for Security Savings Bank" brought claims under "the Nevada Securities Act and the Securities Act of 1933" against "Defendants Banc of America Securities LLC, Barclays Capital Inc., and Morgan Stanley &

Co. LLC." 2012 WL 2904310, at *1 (D. Nev. July 16, 2012). The court held that "related-to-bankruptcy jurisdiction exists" because "defendants claim to have indemnity rights that could affect the rights or liabilities of certain originators that are currently in bankruptcy proceedings." *Id.* at *4; and

- In *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.*, the plaintiff filed "two related cases" against different banks, both of which brought claims "under the federal Securities Act of 1933." 2010 WL 5394742, at *1–2 (N.D. Cal. Dec. 20, 2010). The court held that it "has related-to bankruptcy jurisdiction" over both actions because "Defendants in both actions have indemnification agreements" with bankrupt entities. *Id.* at *4.

In addition, there are enormous efficiencies for both the parties and the courts when Securities Act claims related to a bankruptcy proceeding proceed in federal court, including:

Bankruptcy Coordination. If a Securities Act class action is filed in the same district in which the bankruptcy is pending, the district court will be able to ensure that they are coordinated because bankruptcy courts operate under the supervision of district courts. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679 (2015) ("Bankruptcy judges, like magistrate judges, are appointed and subject to removal by Article III judges. They serve as judicial officers of the United States district court, and collectively constitute a unit of the district court for that district.") (cleaned up); *see also* 28 U.S.C. §§ 151, 152(a)(1), 152(e). For example, the courts will be able to coordinate overlapping discovery in the bankruptcy action and Securities Act action. *See In re SVB Fin. Grp.*, Case No. 23-10367-mg (Bankr.

S.D.N.Y. Mar. 17, 2023), ECF Nos. 340, 345. The bankruptcy court will also be able to ensure that there will be insurance proceeds or other funds available to the estate to pay for defense costs and any settlement in Securities Act litigation. (*See infra* Section II.A.) In fact, in the SVB bankruptcy, the bankruptcy court coordinated the use of insurance proceeds for the multiple Securities Act actions against officers and directors, even though they were filed in different districts. (*See infra* Section II.B.)

If multiple plaintiffs instead file separate Securities Act actions in different states or courts, underwriters may need to litigate the same action in multiple jurisdictions. This will result in unnecessary and duplicative legal work and higher litigation costs, including due to differences in procedural rules and legal standards with respect to pleading, discovery, and case schedules. *See* Michael Klausner, *et al.*, *State Section 11 Litigation In The Post-*Cyan *Environment (Despite* Sciabacucchi*)*, 75 BUS. LAWYER 1769, 1771–74 (2020). All of these costs will ultimately fall on the bankrupt issuer through indemnification. *See id.* at 1787–90.

Consolidation. If multiple plaintiffs file separate Securities Act actions, whether in the same district or in different ones, they can all be transferred and consolidated into a single action, as many SVB-related securities actions were here. Order Consolidating Cases, *In re SVB Fin. Grp. Sec. Litig.*, Case No. 3:23-cv-01098-JD (N.D. Cal. Nov. 30, 2023), ECF No. 82. At a minimum, they can be marked as related, as the *Rossi* and *Stevenson* cases were here. (2-ER-184; 2-ER-195; 3-ER-369; 3-ER-390; 3-ER-405.)

Coordination with Parallel Litigation. Securities Act litigation is often accompanied by parallel litigation challenging the same statements in the same disclosures under the Securities Exchange Act of 1934, 15 U.S.C. § 78, *et seq.* ("Exchange Act") and/or Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"). *See, e.g.*, *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1158 (9th Cir. 2009) (affirming dismissal of complaint alleging that the company and its CEO "violated section 11 of the Securities Act of 1933 and sections 10(b) and 14(e) of the Securities Exchange Act of 1934"). Unlike the Securities Act, the Exchange Act and ERISA do not bar removal and are litigated in federal court. In fact, the Exchange Act provides that federal courts "have exclusive jurisdiction of violations" under the Act. 15 U.S.C. § 78aa(a).

If there is parallel Securities Act litigation in state court and Exchange Act and/or ERISA litigation in federal court, there is no legal mechanism to coordinate these actions for scheduling and discovery purposes, absent removal and coordination. To the contrary, the evidence shows that "the lead counsel and lead plaintiff are different, and counsel for parallel cases generally do not coordinate with one another." Klausner, *et al.*, 75 BUS. LAWYER at 1782. As with piecemeal litigation, the lack of coordination runs the risk of unnecessary and duplicative legal work, higher litigation costs, and conflicting rulings, which ultimately risks harming the debtor (and therefore its creditors).

This risk is most apparent for discovery and scheduling. For "any private action" bringing Securities Act claims filed in federal court, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss" under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). 15 U.S.C. §§ 78u–4(b)(3)(B), 78z–1(b). But California courts are divided over whether the PSLRA discovery stay applies to Securities Act claims filed in state court. *Compare, e.g.*, *In re Pivotal Software, Inc. Sec. Litig.*, 2021 WL 841299, at *2 (Cal. Super. Mar. 4, 2021) (rejecting argument that "the PSLRA's automatic discovery stay applies here"); *Switzer v. Hambrecht & Co., L.L.C.*, 2018 WL 4704776, at *1 (Cal. Super. Sept. 19, 2018) ("The Court finds that the PSLRA's provision for a discovery stay is of a procedural nature, and therefore only applies to actions filed in federal court, not state court."), *with Ocampo v. Williams*, Case No. 21-CIV-03843 (Cal. Super. Ct. July 25, 2022) (applying PSLRA stay to Securities Act claims in state court); *In re Pronai Therapeutics, Inc. S'holder Litig.*, Case No. 16-CIV-02473 (Cal. Super. Ct. Mar. 14, 2018) (same).

As a result, issuers and underwriters defending against Securities Act claims in state court are often forced to incur substantial discovery expenses for months or even years before discovery begins in parallel Exchange Act litigation in federal court. *See* Klausner, *et al.*, 75 BUS. LAWYER at 1773 & n.17 ("The timing of discovery in section 11 cases litigated in state court will have a significant impact on section 11 litigation in state courts."). This can cause substantial inefficiencies, including repetitive fact and expert witness depositions and duplicative document productions. *See id.* at 1790 (discussing "the problem of costly and duplicative parallel litigation in state and federal court"). Indeed, the "early start to discovery" in state court drives "up the defendants' litigation expense[s] before the federal court rule[s] on a motion to dismiss," which "put[s] pressure on the defendants to settle the state case." *Id.* at 1773, 1787 (discussing the *Envivio* securities action in which "the state case settled before . . . a consolidated complaint was even filed in the federal case") (citing *Thomas v. Envivio, Inc.*, Case No. 3:12-cv-06464 (N.D. Cal. Dec. 20, 2012); *Wiley v. Envivio, Inc.*, Case No. CIV517185 (Cal. Super. Ct. Oct. 5, 2012)).

Even more concerning is the risk of conflicting rulings despite identical facts and law. For example, to survive a motion to dismiss in federal court, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," which "asks for more than a sheer possibility that a defendant has acted unlawfully." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[3] In California state court, by contrast, a plaintiff need only plead a "statement of the facts constituting the cause of action, in ordinary and concise language." CAL. CODE CIV. P. § 425.10(a)(1).[4] As a result, Section 11 Claims asserted in California state courts—which are remarkably "a large majority of cases filed in state court" bringing Section 11 Claims across the United States, *see* Klausner, *et al.*, 75 BUS. LAWYER at 1775–77 (analyzing Securities Act filings)—are subject to a lower pleading standard.

The consequences are stark for Securities Act defendants. From 2011 through 2019, the dismissal rate for Section 11 Claims filed in federal court was 39% but was only 18% in California state courts—that is, a Securities Act action is ***more than twice as likely to be dismissed*** if filed in federal court instead of California state court. *See* Klausner, *et al.*, 75 BUS. LAWYER at 1777. These differing pleading standards has led to "an increase in low-merit cases that are attracted to state courts by lenient procedural rules." *Id.* at 1776–82.

As an example, in 2016, multiple Securities Act actions were filed against issuer Sunrun, Inc. and its underwriters, among others, in California federal court and in California state court. *See, e.g.*, *Greenberg v. Sunrun Inc.*, Case

[3] For claims that "sound in fraud," plaintiffs must satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b) and the PSLRA.

[4] Other states have different pleading standards. *See, e.g.*, N.Y. CIV. PRAC. L. R. § 3013.

No. 3:16-cv-02480 (N.D. Cal. filed May 6, 2016); *In re Sunrun Inc. S'holder Litig.*, Case No. CIV538215 (Cal. Super. Ct. filed Apr. 13, 2016). Although both actions brought the same Securities Act claims based on the same challenged statements, the state court denied the motion to dismiss, because "Plaintiffs have adequately pleaded allegations that Defendants made material misrepresentations and omissions in the Prospectus and Registration Statement," Case Management Order #2 ¶¶ 4–5, *In re Sunrun, Inc. S'holder Litig.*, Case No. CIV538215 (Cal. Super. Ct. Jan. 17, 2017), while the federal court dismissed the Securities Act claims, because the alleged misstatements were not misleading or were inactionable puffery. *Greenberg v. Sunrun, Inc.*, 233 F. Supp. 3d 764, 772–75 & n.15 (N.D. Cal. 2017) ("disagree[ing] with some parts of Judge Weiner's decision in the parallel state court litigation"). The issuer ultimately paid over $30 million to settle the claims, including those asserted against the underwriters. Order Granting Final Approval of Class Action Settlement, *In re Sunrun, Inc. S'holder Litig.*, Case No. CIV538215 (Cal. Super. Ct. Dec. 14, 2018).

II. PREVENTING REMOVAL OF SECURITIES ACT CLAIMS RELATED TO BANKRUPTCIES WILL HAVE ADVERSE CONSEQUENCES FOR U.S. FINANCIAL MARKETS.

A. Requiring Piecemeal Litigation In State Court Will Frustrate The Federal Bankruptcy Scheme.

"'Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'" *Wike v. State Bar of Nev. (In re Wike)*, 660 B.R. 683, 692 (B.A.P. 9th Cir. 2024) (quoting *Gruntz*, 202 F.3d at 1080); *see also WorldCom*, 368 F.3d at 103. Federal related-to jurisdiction under the Bankruptcy Code is thus "designed to further Congress's purpose of centralizing bankruptcy litigation in a federal forum." *Curtis v. Shpak (In re Curtis)*, 571 B.R. 441, 445 (B.A.P. 9th Cir. 2017) (quoting *WorldCom*, 368 F.3d at 103); *see also Wike*, 660 B.R. at 693 (emphasizing "the principle of a unified federal bankruptcy system").

In fact, the Constitution gives "Congress[] plenary power over bankruptcy," including core "matters related to bankruptcies," which it has used to give "exclusive jurisdiction [to] the federal courts" through the Bankruptcy Code and prohibit "state courts" from having any role in the bankruptcy process. *Wike*, 660 B.R. at 692–93 (quoting *Gruntz*, 202 F.3d at 1080, 1083–84 (citing U.S. CONST. art. I, § 8)). The Constitution's Bankruptcy Clause provides that "Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4 (emphasis added). The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.* art. I, § 10, cl. 1. Because the bankruptcy process necessarily involves the modification of contracts, such as debt obligations, the Bankruptcy Clause and Contracts Clause work together to "encompass[] the entire subject of Bankruptcies" and exclude the states from having any role in the core bankruptcy process. *Cent. Va. Comm. Coll. v. Katz*, 546 U.S. 356, 370 (2006); *see also Gruntz*, 202 F.3d at 1083 (state court judgments must "defer to the plenary power vested in the federal courts over bankruptcy proceedings"). Congress must give express approval to prevent removal of "matters connected with the bankruptcy estate," but it has notably not done so in the Securities Act. *Wike*, 660 B.R. at 692 (quoting *Gruntz*, 202 F.3d at 1080).

In contravention of this settled body of law, Plaintiffs-Appellants seek to force underwriters that are contractually indemnified by bankrupt issuers to litigate Securities Act claims in state court, which "could interfere with the operation of the Bankruptcy Code, especially in large chapter 11 cases." *WorldCom*, 368 F.3d at 103–04; *see also Luther v. Countrywide Fin. Corp.*, 2012 WL 12888836, at *2 (C.D. Cal. Sept. 4, 2012) ("a finding that [the Securities Act] bars removal would 'unduly interfere' with the operation of the Bankruptcy Code") (quoting *WorldCom*, 368 F.3d at 103); *Fed. Home Loan Bank of S.F. v. Deutsche Bank Sec., Inc.*, 2010 WL 5394742, at *6 (N.D. Cal. Dec. 20, 2010) ("the Court will not construe [the Securities Act] in a way that would unduly interfere with [the] operations" of "matters related to bankruptcy proceedings").

"When a debtor seeks to reorganize . . . its plan of reorganization must resolve ***all*** lawfully pending liabilities, and, to do so, the plan must marshal and allocate ***all*** of the debtor's assets." *WorldCom*, 368 F.3d at 104 (emphasis added). "Regardless of whether the defendants' contribution or indemnification claims in this particular case ultimately had a material impact on [the] final plan of reorganization, it is apparent that contribution and indemnification claims can, in some circumstances, affect the administration of a bankrupt estate." *Id.* Permitting Securities Act claims to proceed separately from other claims affecting the debtor interferes with this system "[b]ecause, in any given case, the full amount of damages sought under the 1933 Act can be the basis for a claim against the estate, [so] the policy underlying" federal related-to jurisdiction under the Bankruptcy Code "applies with full force to claims under the [Securities] Act." *Id.* "Allowing state court remedies" that impact obligations on the bankrupt estate to proceed "would subvert the exclusive jurisdiction of the federal courts and undermine uniformity in bankruptcy law by allowing state courts to create their own standards." *Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1090 (9th Cir. 2005). "The bankruptcy court would then be stripped of its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize financial affairs," which "would undermine the principle of a unified federal bankruptcy system, as declared in the Constitution and realized through the Bankruptcy Code." *Gruntz*, 202 F.3d at 1083–84. There is no question that this would "unduly interfere" with the operation of the Bankruptcy Code. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

Plaintiffs-Appellants attempt to minimize the risk that the Securities Act removal bar "could interfere with the operation of the Bankruptcy Code" as a "hypothetical concern[]." (Pls.' Br. at 49 n.13.) But this ignores that, as discussed above, bankrupt issuers have already indemnified underwriters for litigation expenses in Securities Act actions as incurred. These contractual obligations have an immediate and actual effect on the bankruptcy estate and process. (*See supra* Section I.) Bankrupt issuers have also typically indemnified underwriters for any settlement in Securities Act actions, which can be ***hundreds of millions or even billions of dollars*** because of the statutory formula for calculating damages. *See* 15 U.S.C. § 77k(e); Cornerstone Research, *Securities Class Action Settlements: 2024 Review and Analysis*, 8; *see also, e.g.*, *Luther v. Countrywide Fin. Corp.*, Case No. 2:12-cv-05125 (C.D. Cal. June 12, 2012), ECF No. 320 (approving $500 million settlement for alleged violations of the Securities Act); *In re Bear Stearns Mort. Pass-Through Certificates Litig.*, Case No. 1:08-cv-08093 (S.D.N.Y. Sep. 18, 2008), ECF No. 286 (approving $500 million settlement for alleged violations of the Securities Act). From 2015 to 2023, the alleged median dollar loss on offered shares for Securities Act claims filed in state court was ***$149.2 billion*** (in 2024 dollars). *See* 2024 Cornerstone Report, 18. Because of the standard indemnification provisions in underwriting agreements, these enormous settlements would be obligations of the debtor in bankruptcy, which could significantly affect the administration of the estate and any final plan of reorganization.

Moreover, because a Securities Act class action filed in state court is unlikely to be coordinated with the Bankruptcy Court (as discussed above), any settlement may not be reached until much later in the bankruptcy process or even after approval of a bankruptcy plan. (*See supra* Section I.) This may lead to negative consequences for creditors in the bankruptcy case. For example, an unresolved indemnification claim may trigger a bankruptcy plan's "disputed claim reserve," which is not uncommon and is designed to ensure that all general unsecured creditors receive the same distribution, regardless of when such claims are ultimately allowed in the bankruptcy case. *See, e.g.*, Order Confirming The Third Amended Joint Chapter 11 Plan of Reorganization For WOM S.A. And Its Affiliated Debtors, *In re WOM S.A.*, Case No. 24-10628-KBO (Bankr. Del. Mar. 7, 2025), ECF No. 1250. As a result, general unsecured creditors may have all or a portion of their distributions delayed until the state court proceeding is resolved. *Id.*

If there is no such reserve then, by the time the underwriter seeks indemnification from the debtor, there may no longer be sufficient funds left, particularly if the settlement is large. This effectively nullifies the indemnification provisions in underwriting agreements and leaves underwriters liable for litigation expenses and settlement for which they are indemnified.

These effects are magnified if the Securities Act action is remanded to state court. Any suggestion that the Securities Act claims are not related to the bankruptcy, despite the indemnification and contribution provisions, forces the underwriters to bring separate claims against the debtor asserting indemnification in bankruptcy court, *see, e.g.*, *Cobalt Partners, LP v. SunEdison, Inc.*, 2016 WL 4488181, at *2 (N.D. Cal. Aug. 26, 2016), which makes it more likely that there will be insufficient funds available for defense expenses and/or any settlement.

B. The Risk Of State Court Litigation Is Already Impacting The SVB Bankruptcy.

The inefficiencies and harms of piecemeal Securities Act litigation discussed above (*see supra* Section I) are adversely affecting the SVB bankruptcy. Should this action be remanded to state court, it will risk further harm to underwriters, creditors, and the bankruptcy process.

In the SVB bankruptcy, the bankruptcy court coordinated the use of insurance proceeds for the Securities Act actions against officers and directors, including in the *Rossi* and *Stevenson* actions. *In re SVB Fin. Grp.*, 650 B.R. 790, 802 (Bankr. S.D.N.Y. 2023). The confirmed SVB bankruptcy plan also provides for a "Disputed Claims Reserve." Findings of Fact, Conclusion of Law and Order Confirming the Debtor's Second Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code, *In re SVB Fin. Grp.*, Case No. 23-10367-mg (Bankr. S.D.N.Y. Aug. 2, 2024), ECF No. 1379. Thus, there are currently limited insurance proceeds available to pay for the legal expenses indemnified parties are incurring defending against SVB-related Securities Act litigation. To the extent those insurance proceeds are exhausted—which will happen more quickly if these issues are litigated piecemeal in state court—the indemnified parties will have claims against the debtors. As a result of the confirmed plan, these claims may reduce and/or delay the distributions of SVB's other general unsecured creditors.

There are *seven* different SVB-related Securities Act actions currently pending in the Northern District of California alone and incurring legal expenses. (*See* 2-ER-184, 2-ER-195.) While many of them have been consolidated, *Rossi* and *Stevenson* have not been because of the risk they may be remanded back to state court. (*See supra* Section I.) This is needlessly increasing litigation expenses to the detriment of SVB's creditors and other indemnified parties. Should *Rossi* and *Stevenson* be remanded to state court while the five other SVB-related Securities Act actions remain in federal court, this will further increase litigation expenses and also runs the risk of inconsistent rulings, like in the *Sunrun* securities actions discussed above in which the defendants were forced to settle dismissed Securities Act claims for tens of millions of dollars. (*See supra* Section I.) The Securities Act defendants in *Rossi* and *Stevenson* would also face increased risk that the applicable insurance proceeds will be exhausted. As a result, these defendants will be forced to seek payment from the SVB estate, which is far from certain given that there may be insufficient funds left to indemnify them.

C. The Potential For State Court Litigation Risks Chilling Underwriters From Providing Services To Distressed Companies.

The risk of litigating Securities Act claims related to bankruptcy in state court may have economic implications far beyond the SVB bankruptcy and similar contexts. Financial services firms play a key role for distressed companies. Such companies routinely have an acute need for additional capital. *See, e.g.*, *In re Pasadera Country Club, LLC*, 2011 WL 13499483 (Bankr. N.D. Cal. Sept. 19, 2011) (approving "DIP Financing"); *In re Pac. Steel Casting Co. Berkeley Props., LLC*, 2010 WL 11823319 (Bankr. N.D. Cal. Mar. 30, 2010) (same). Financial services firms that underwrite such debt and equity offerings thus provide an essential lifeline to enable distressed companies to continue operating.

Underwriting debt and equity offerings entails substantial risk, particularly for less creditworthy distressed and bankrupt issuers. (*See supra* Section I.) It also entails risk for companies that were not distressed when they issued debt or equity but later ran into financial difficulties. *See, e.g.*, *Fed. Home Loan Bank of Seattle v. Deutsche Bank Sec., Inc.*, 736 F. Supp. 2d 1283, 1290 (W.D. Wash. 2010); *Pac. Life Ins. Co. v. J.P. Morgan Chase & Co.*, 2003 WL 22025158, at *1 (C.D. Cal. June 30, 2003). As discussed above (*see supra* Section I), underwriters are not willing to assume the additional risk of Securities Act liability and require indemnification against such risks in underwriting agreements. Because they are indemnified, underwriters expect to litigate any Securities Act claims in federal court in the event of a bankruptcy. (*Id.*) If underwriters "with contribution rights" or indemnification rights for Securities Act claims are instead "subject to conflicting outcomes along with repetitive and time-consuming discovery proceedings in multiple state courts," *WorldCom*, 368 F.3d at 104, they may be less likely to provide underwriting services to distressed companies. This would prevent such companies from getting access to the capital they need, which would have a negative impact on the U.S. economy.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants-Appellees' response brief, this Court should affirm the district court's decision.

Respectfully submitted,

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March 31, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1, counsel for *Amicus Curiae* SIFMA hereby certifies that this *amicus* brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2(c) because this brief contains 6,403 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. Counsel's approximation is based on the "Word Count" function of the word-processing program used to draft the enclosed brief.

Counsel for *Amicus Curiae* SIFMA certifies that this brief also complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2021 in 14-point Times New Roman font.

Dated: March 31, 2025

/s/ Todd G. Cosenza

Todd G. Cosenza

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned attorney states that I am not aware of any related cases currently pending in this Court.

Dated: March 31, 2025

/s/ Todd G. Cosenza

Todd G. Cosenza

CERTIFICATE OF SERVICE

I, Todd G. Cosenza, hereby certify that on March 31, 2025, I caused the foregoing Brief of *Amicus Curiae* SIFMA to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 31, 2025

/s/ Todd G. Cosenza

Todd G. Cosenza

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Under FRAP 26.1 and Circuit Rule 26.1-1, I make the following disclosures:

1. I disclose the following information required by FRAP 26.1(a) and/or Circuit Rule 26.1-1(b) for any nongovernmental corporation, association, joint venture, partnership, limited liability company, or similar entity[1] which is a party, prospective intervenor, or amicus curiae in any proceeding, or which the government identifies as an organizational victim below in section 2 of this form,[2] or which is a debtor as disclosed below in section 3 of this form.

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Signature /s/ Todd G. Cosenza **Date** 03/31/2025

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