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Court of Appeals

of the

State of New York

THE PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO,
Attorney General of the State of New York,

Plaintiff-Respondent,

– against –

MAURICE R. GREENBERG and HOWARD I. SMITH,

Defendants-Appellants.

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community. This case is of particular importance to the Chamber given the broad range of perspectives and experiences of its members, who are often the targets of suits asserting securities claims under state or federal law, and whose directors, officers and managers are often named as defendants in such suits.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with more than $7.3 trillion in annual revenues and nearly 16 million employees. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and it participates in litigation as amicus curiae in a variety of contexts where important business interests are at stake.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

ARGUMENT

Congress has created uniform federal standards to govern securities lawsuits seeking damages on a class-wide basis. A securities class action or mass action seeking to recover damages for private parties under state law is accordingly barred by federal law. The sole question addressed by this submission is whether Congress's restrictions on the availability of class-action damages may be circumvented through the device of bringing the action for class-wide damages relief in the name of the state. Congress's multiple limitations on state-law claims cannot be avoided so easily; the New York Attorney General's (NYAG) class damages action is accordingly precluded by federal law.

To begin with, there is no doubt that the claim here is equivalent in all relevant respects to a securities class action. The objectives and principal relief sought are identical to those of the private class action pending in federal court. The best

proof of this fact is the NYAG's recognition that approval of the pending settlement of the federal court class action would preclude the NYAG's own claim. For this reason, the NYAG has attempted to convince the federal court to disapprove the settlement.

The only difference, in addition to undermining the settlement privately negotiated, is that the NYAG seeks to use a lesser standard of proof than that mandated by federal law. If accepted, the NYAG's theory would work a dramatic and sweeping change to mass action securities proceedings.[1]

The class-action-in-disguise is barred by the uniform federal standards fashioned by Congress for securities litigation seeking damages to compensate private parties. *See*, *e.g.*, 143 Cong. Rec. S10475 (daily ed. Oct. 7, 1997) (statement of Sen. Gramm) ("we have been moving toward national standards for national securities" which is generally consistent "with the principles behind the commerce clause of the Constitution"). The purpose of the federal statutes at issue in this case—the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737; the National Securities Markets Improvement Act of 1996

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[1] The NYAG has argued (Br. 57) that its action seeks relief other than class-wide damages. While it is true that the complaint mentioned injunctive and disgorgement relief, Defendants-Appellants argue persuasively that those claims are not viable. Reply 12-18. And even if they were, the inclusion of such claims cannot, and does not, insulate the damages claim against the preclusive effect of federal law. The world-wide damages claim is precluded whether or not the complaint includes any other viable claims.

(NSMIA), Pub. L. No. 104-290, 110 Stat. 3416; and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227—was to ensure that no single state or jurisdiction could "impose the risks and costs of its peculiar litigation system on all national issuers." S. Rep. No. 105-182, 1998 WL 226714, at *5 (1998) (quotation omitted). As Justice Catterson's dissenting opinion explains, the holding below cannot be squared with Congress's express purposes in adopting these laws.

The consequences of permitting an action like this one to proceed would be grave indeed. To begin with, national uniformity established by federal securities laws is critical to the economy; uniform federal laws "promote efficiency, competition, and capital formation in the capital markets," and "advance the development of national securities markets … by, as a general rule, designating the Federal government as the *exclusive* regulator" of national securities markets. H.R. Rep. No. 104-622, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3877, 3878 (emphasis added). Given the important role that the securities markets play in the growth and sustenance of the Nation's economy, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

Moreover, New York is the Nation's and the world's preeminent financial center. By subjecting businesses and individuals to huge monetary liability under variable and uncertain state-law standards for violations of the securities laws, the theory adopted by the NYAG, if accepted, would inhibit capital investment, impose enormous compliance costs on market participants, and discourage public companies from issuing securities here in the United States. These effects will have significant adverse consequences on economic development in New York, where the financial services sector is a critically important generator of jobs and other economic activity.

I. THIS SUIT ENDANGERS NATIONAL UNIFORMITY WITH RESPECT TO SECURITIES LITIGATION AND JEOPARDIZES INVESTMENT IN NEW YORK.

A rule permitting the NYAG to bring what is, in effect, indistinguishable from a worldwide securities class action under New York law would invite state attorneys general to file similar actions throughout the Nation, undermining the national uniformity that Congress sought to create. The net result would be the promulgation and enforcement of variable standards for legal duties of securities issuers and their officers and directors. Such variability would inhibit capital investment, impose enormous compliance costs on market participants, and discourage public companies from issuing securities here in the United States. That would inflict substantial adverse consequences upon New York's economy.

1. The most immediate consequence of the NYAG's theory, and the decision below, would be the undoing of the uniformity Congress meant to achieve by passage of the PSLRA, NSMIA, and SLUSA. It would license any state attorney general to seek monetary damages on behalf of a massive, nationwide (or, as here, worldwide) class of private individuals for violations of *state* law in connection with publicly-traded securities. That would mean liability for potentially huge amounts of damages without satisfying the standards established by the PSLRA and SLUSA—even though the very same action, raising the very same claims, predicated on the very same facts, would be precluded if brought directly by the beneficiaries of the suit themselves. In short, one state attorney general may, unilaterally, override the national standards governing securities class actions.

The NYAG's contention thus risks bringing about the uncertainty and lack of uniformity that the federal laws at issue here were meant to eliminate. Issuers of securities would once again face the prospect of being held liable in a *de facto* class action in one state under the idiosyncratic liability standards of that state and again in *another* state under the *different* liability standards of that *other* state. Such variability in liability standards is certain to disrupt the capital markets.

Making matters worse, which particular standards prevail in any given state and whether government officials in that state elect to pursue a lawsuit will be determined primarily by local interests. The targets of these local "enforcement" (but

in reality "damages") suits will have to bear the brunt of narrow, and perhaps parochial, deliberations applying state law. The result is a patchwork of state laws, inconsistent in their content and erratic in their application. And because attorneys general (like the NYAG in this case) may well seek to enforce their states' idiosyncratic policies on behalf of citizens not only of their own states, but also of others, the additional consequence is the precise exportation of a single state's law over interstate and international borders that the PSLRA, NSMIA, and SLUSA were designed to foreclose. *See* S. Rep. No. 105-182, 1998 WL 226714, at *5 (1998) (SLUSA was meant to ensure that no single state or jurisdiction can "impose the risks and costs of its peculiar litigation system on all national issuers") (quotation omitted).

2. The disuniformity that follows as a consequence of the rule embraced below is not merely a matter of academic concern. The complex ways in which national and global companies participate in New York's securities markets—and the manner in which those markets are regulated—have national and, indeed, global consequences. *See* S. Rep. No. 105-182, 1998 WL 226714, at *4 ("we live in an information age in which we have truly national, if not international, securities markets"). As the Supreme Court has said, private securities litigation in this global age "demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652

(1988). The alternative—a multiplicity of state-by-state standards for private liability under the securities laws—imposes enormous costs on the markets.

It is easy to see why. As Congress recognized prior to enacting SLUSA, state-law securities class actions, governed by variable standards for liability from jurisdiction to jurisdiction, "created a ripple-effect that … inhibited small, high-growth companies in their efforts to raise capital" and "damaged the overall efficiency of our capital markets." S. Rep. No. 105-182, 1998 WL 226714, at *4. This inefficiency flowed from the variability in liability standards itself: Because all corporations "listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently," a state-by-state approach to securities regulation injects intolerable uncertainty into the marketplace. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 90 (1987).

Without a single, uniform standard, national companies and their executives could never be certain of what securities laws governed what conduct, at what time, and in what location. Companies with presences across the country thus were forced to adopt policies to conform their practices, uniformly, with the most demanding state-law regulations. Of course, behavior like this, motivated solely by "[f]ear of litigation," is extremely costly in its own right and, for this reason, "keeps companies out of the capital markets." H.R. Rep. No. 104-50, at 19-20 (1995).

There are other, indirect burdens and costs of variability in standards governing securities class actions seeking damages. For example, unpredictable standards deter competent individuals from serving as independent directors on corporate boards. S. Rep. No. 104-98, at 21 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 700. Unclear or overly lax or oppressive liability standards furthermore risk chilling corporate disclosures of information, since any disclosure could form the basis of a state action. Yet such disclosures are "necessary to the preservation of a healthy market." *Dirks v. SEC*, 463 U.S. 646, 658-59 (1983). Alternatively, issuers may respond to the threat of more relaxed liability standards with defensive disclosures that "bury the shareholders in an avalanche of trivial information." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).

3. The adverse consequences of the NYAG's expansive theory are not limited to capital markets participants—the decision also poses a significant threat to the vitality of New York's economy.

The importance to New York of its financial services sector is well recognized. But New York faces tough global competition in maintaining its preeminent status. A 2007 report commissioned by Mayor Bloomberg and Senator Schumer found that "[t]he threat to US and New York global financial services leadership is real …. It is clear that the country and the City need to take this threat seriously."

Sustaining New York's and the US' Global Financial Services Leadership at 10 (2007), http://tinyurl.com/bzkr44n (*Sustaining New York's Leadership*).

That competition has only increased since the financial collapse of 2008. Hal S. Scott, President and Director of the Committee on Capital Markets Regulation, recently reported that "[t]he size and value of U.S. capital markets declined in 2010. Many improvements that we saw in 2009 appear to have been a result of a flight to quality. We now seem to have reverted to the long-term trend of continued loss of competitiveness." Comm. on Capital Mkts. Regulation, Press Release, *Latest CCMR Study Shows Deterioration in Competitiveness of U.S. Public Equity Markets in 2010 Compared to 2009* (Mar. 22, 2011) (quotation omitted).

The Bloomberg-Schumer report found that "the unpredictable nature of the legal system" was a key factor that "caused New York to be viewed negatively" by executives charged with choosing where to raise capital. *Sustaining New York's Leadership* at 73. The risk of personal liability under unpredictable legal rules and the different standards applied by multiple law enforcement entities were identified as particular concerns. *Id*. at 76-77. As Mayor Bloomberg and Senator Schumer explained, "the highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies." *Id*. at ii. The effect of variable liability standards in this era of globalized

finance is therefore clear: In choosing among the world's capital markets, global companies are substantially less likely to choose U.S. markets if they view domestic issuance as opening the door to liability under multiple, uncertain standards in lawsuits that can be initiated by multiple parties.

Issuers require clear standards by which to conform their behavior; if U.S. markets cannot offer this essential feature, many global businesses will simply move their securities to other markets that do. This, in turn, will make less capital domestically available for new and growing companies. And it will inflict very significant harm upon New York's economy.

II. FEDERAL LAW PRECLUDES THIS ACTION.

It is a fundamental principle of our federal system that "state and local laws that conflict with federal law are 'without effect.'" *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103-04 (2d Cir. 2010) (per curiam) (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008)). Two separate grounds for preclusion are relevant to the present litigation: "express" preclusion, "where Congress has expressly preempted local law," and "conflict" preclusion, "where … the local law is an obstacle to the achievement of federal objectives." *Id.* (citing *Wachovia*

Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005)).[2] This suit is precluded on both grounds.

First, Congress in SLUSA, Pub. L. No. 105-353, 112 Stat. 3227, explicitly precluded awards of damages to private parties in class actions alleging securities fraud in violation of state law. That is precisely what this case is: a lawsuit seeking damages awards for a broad class of private parties.

Second, and separately, federal law also precludes this action by implication. In enacting the PSLRA, Pub. L. No. 10-67, 109 Stat. 737, and SLUSA, Congress created uniform national standards for the recovery of private damages by shareholders alleging securities fraud. The standards include heightened requirements for pleading and proving fraud under the securities laws, including a requirement of scienter. The claims in this case—if permitted to go forward—would allow a

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[2] Although SLUSA is often said to "preempt" state law, the Second Circuit (taking its cue from the Supreme Court) recently clarified that "SLUSA is a statute of preclusion, rather than preemption." *Romano v. Kazacos*, 609 F.3d 512, 519 (2d Cir. 2010). That is because it "does not *displace* state law with federal law," but rather precludes certain state-law securities claims from being litigated *as class actions*, permitting them to proceed only on an individual basis. *Id*. at 519 n.2 (citing *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006)). But the distinction between preemption and preclusion is largely semantic: "the preemption question [is] sufficiently similar to the preclusion question to make the analysis employed in . . . preemption cases applicable in preclusion cases as well." *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 757 n.2 (7th Cir. 2008) (quotation omitted); *see also Sturge v. Nw. Airlines, Inc.*, 658 F.3d 832, 836 n.4 (8th Cir. 2011) ("questions of preemption and preclusion involve the same inquiry," and courts typically "look to both preclusion and preemption cases for guidance" regardless of which concept applies).

class of private individuals to recover damages for securities fraud without proof of either scienter or reliance, and therefore would fundamentally conflict with the comprehensive national balance Congress struck.

It is important to make clear at the outset that both of these grounds precluding the action are tied to the particular nature of the claim here—which seeks damages on behalf of a worldwide class of allegedly injured parties. The NYAG's attempt to frame the issue here in broader terms—as supposedly involving "preemption of New York's Martin Act" (Br. 64)—is thus patently false. All that is preempted is the NYAG's unprecedented attempt to use the Martin Act as a device for circumventing federal limits on class-action damages. The NYAG may use the Martin Act to pursue viable claims for injunctive relief, civil penalties, disgorgement, or other traditional remedies available to a sovereign in an enforcement action. But the NYAG simply may not use that law to circumvent clearly delineated federal standards governing class damages claims.

Moreover, the NYAG makes much of the presumption against preemption. NYAG Br. 67-70. That presumption, however, "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 90 (2000). There can be little doubt that, since the Securities Act of 1933, Pub. L. No. 22, 48 Stat. 74, the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, the Commodity Exchange Act, 49

Stat. 1491, the Trust Indenture Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147, and other substantial laws, there has been a history of significant federal presence in the realm of securities regulation. Moreover, in considering SLUSA itself, the Supreme Court has instructed that courts must apply a "presumption that Congress envisioned a broad construction" of that Act, which "follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

A. The Securities Litigation Uniform Standards Act Expressly Precludes This Action.

"Express preemption arises when 'a federal statute expressly directs that state law be ousted.'" *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 101 (2d Cir. 2009) (quoting *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) (per curiam)). The inquiry thus turns upon whether "Congress [has] manifest[ed] [an] intent to preempt state or local law explicitly, through the express language of a federal statute." *New York SMSA*, 612 F.3d at 104 (citing *Altria Group*, 555 U.S. at 76). Here, SLUSA's express language demonstrates precisely such an intent.

Finding that class-action litigants were bringing abusive litigation regarding nationally-traded securities, Congress adopted the PSLRA. That statute contained several procedural and substantive safeguards to counter this litigation abuse. Liti-

gants, however, responded by simply moving to state courts and pursuing substantively-identical, abusive claims via state law. Congress enacted SLUSA, just three years after it enacted the PSLRA, to preclude litigants from circumventing the PSLRA's carefully-drawn limitations on private damages for securities fraud.

SLUSA provides, in part, that "[n]o 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 … that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). *See also id*. § 77p(b) (materially same). The statute defines a "covered class action," in turn, as "any single lawsuit in which … damages are sought on behalf of more than 50 persons" (*id*. § 78bb(f)(5)(B)(i)(I)) and a "covered security" as any security regulated under the Securities and Exchange Act of 1933 (*id*. § 78bb(f)(5)(E)). Thus to give effect to "SLUSA's stated purpose" requires a "broad construction" of the statute. *Dabit*, 547 U.S. at 86.

Although SLUSA broadly precludes state law claims that would hold a security issuer liable for claims of fraud, misrepresentation, or the like, the statute nevertheless preserves a limited role for state enforcement actions: "securities commission (or any agency or office performing like functions) of any State shall re-

tain jurisdiction under the laws of such State to investigate and bring enforcement actions." 15 U.S.C. § 78bb(f)(4).

SLUSA precludes this action because (1) it qualifies as a "covered class action" that alleges use of a "manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security," (2) it is brought on behalf of a "private party," rather than for furtherance of sovereign state interests, and (3) it is not an "enforcement action" saved by the statute.

That result is completely consistent with SLUSA's basic purpose. After all, SLUSA was enacted to address the problem of federal class-action claims morphing into state-law actions in order to avoid the substantive standards specified in the PSLRA. Congress could easily have anticipated that class damages actions would adapt further in response to the enactment of SLUSA itself, including through the use of proceedings brought formally on behalf of governmental entities.

1. This lawsuit is a "covered class action" under SLUSA.

SLUSA applies when a claim relates to a "covered security," alleges that the defendant "used or employed any manipulative or deceptive devise or contrivance in connection with the purchase or sale" of such a security, and "damages are sought on behalf of more than 50 persons." 15 U.S.C. § 78bb(f).

To determine whether an action satisfies these requirements, a court must look to "the substance of a complaint's allegations in applying SLUSA. Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words and nothing more." *Romano*, 609 F.3d at 520 (quoting *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009)). Each of the three requirements is satisfied here.

The securities at issue, shares of AIG stock, are "covered" as they are traded on the New York Stock Exchange. *See* 15 U.S.C. § 78bb(f)(5)(E) (defining covered security by reference to 15 U.S.C. § 77r(b)).

The underlying claims undoubtedly allege misconduct falling within SLUSA. The Complaint, for example, specifically alleges "fraud, deception, concealment, suppression, or false pretense" in connection with "the issuance, distribution, exchange, sale, negotiation, or purchase" of securities. Compl. ¶ 76 (R. 1591). *See also id*. ¶¶ 4, 75, 77 (R. 1572, 1591-92). Likewise, the NYAG's Motion for Partial Summary Judgment noted, for example, that individuals "have been convicted of federal securities law violations" for the General Re Transaction. NYAG Mot. for Summ. J. at 2 (R. 14251).[3] Similarly, the NYAG alleges that "the CAPCO transaction was simply a device to get AIG's losses off its books by converting the un-

[3] These convictions, however, were reversed on appeal. *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011).

derwriting loss into investment losses, which the stock market would perceive as less serious." *Id*. at 3 (R. 14252). This is precisely a situation "where plaintiff's claims turn on injuries caused by acting on misleading investment advice—that is, where plaintiff's claims necessarily allege, necessarily involve, or rest on the purchase or sale of securities." *Romano*, 609 F.3d at 522 (quotation omitted).

Finally, the Complaint plainly seeks to recover damages "on behalf of more than 50 persons" (15 U.S.C. § 78bb(f)(5)(B)(i)(I))—it seeks damages for a world-wide class of all purchasers of AIG stock. In so doing, the action also seeks damages for "unnamed parties." *Id*. § 78bb(f)(5)(B)(i)(II).

The NYAG cannot disguise that it seeks private damages for a world-wide class in this lawsuit. In a filing in the class action pending in federal court, the NYAG characterized its claim here as "seeking billions of dollars in damages for the victims of the [AIG] fraud." *See* Letter from David N. Ellenhorn to Hon. Deborah A. Batts at 1, Jan. 25, 2011 (R. 15162). And in a subsequent letter in the same case, the NYAG made clear his view that he can use the Martin Act to "obtain damages on behalf of all AIG stockholders, no matter where they reside." *See* Letter from David N. Ellenhorn to Hon. Deborah A. Batts at 4, Feb. 25, 2011 (R. 15173). Thus the NYAG himself has acknowledged that this action is being prosecuted to recover money damages on behalf of a nationwide class of private individuals.

The NYAG nonetheless contends here that the Complaint does not seek damages "on behalf of" those individuals because the caption states that the action is brought by the "People of the State of New York." NYAG Br. 77. But SLUSA focuses on "the substance of a complaint's allegations" (*Romano*, 609 F.3d at 520 (quotation omitted)), not the formal state or federal procedural device. Here, because the suit would have the effect of providing damages for a wide class of private individuals—regardless of the action's form or label—it is covered. *See* 15 U.S.C. § 78bb(f)(5)(B). In short, this action qualifies as a "covered class action" relating to allegedly improper transactions for covered securities.

2. *Because the action is being prosecuted solely for private interests, federal law deems private individuals as the true parties in interest.*

The NYAG's principal contention is that, because SLUSA precludes only actions "maintained in any State or Federal court by any *private party*" (emphasis added), and this action formally is brought in the name of the State, SLUSA's prohibition does not apply. That interpretation of the statute is plainly wrong.

If the NYAG were correct—and an action formally brought in the name of a state can never satisfy Section 78bb(f)(1)—there would be no need for the separate statutory provision excluding from SLUSA's prohibition enforcement actions brought by a "securities commission (or any agency or office performing like functions) of any State" (15 U.S.C. § 78bb(f)(4)). Enforcement actions brought by a state securities commission or similar agency plainly are not actions "maintained

… by any private party," and therefore would never qualify for preclusion under the NYAG's broad construction of Section 78bb(f)(1); the separate exclusion would be entirely superfluous.

It is "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). But the NYAG's view that the identity of the party named in the caption controls in determining whether an action is "maintained … by any private party" would render unnecessary and superfluous the separate statutory provision excluding state enforcement actions, and the NYAG's interpretation of the statute accordingly must be rejected.

Rather, the governing legal standard is one long recognized in a variety of federal contexts in which courts have distinguished between suits brought by a state in its sovereign capacity and those actions a state brings solely for the private benefit of individual citizens. A state cannot simply dress up the private disputes of its citizenry in order to circumvent federal limitations applicable to private claims.

For example, although the Supreme Court has jurisdiction over "controversies between two or more States" (U.S. Const., art. III, § 2, cl. 1), an action involving "nothing more than a collectivity of private suits" does not qualify as an action

by a state for purposes of this provision. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (per curiam). Similarly a state representing solely the private interests of its citizenry could not invoke the Court's original jurisdiction to challenge the constitutionality of a neighboring state's commuter tax. *See also Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393 (1938) (a court "must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest").

Likewise, the Second Circuit has found that "when the state merely asserts the personal claims of its citizens, it is not the real party in interest" and therefore the state may not assert Eleventh Amendment immunity. *In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985). *See also Purdue Pharma L.P. v. Kentucky*, 2013 WL 85918, at *4 (2d Cir. 2013) ("To assert *parens patriae* standing, the State (or Commonwealth) must articulate a 'quasi-sovereign interest' distinct 'from the interests of particular private parties,' such as an 'interest in the health and well-being—both physical and economic—of its residents in general.'").[4] And

[4] *People of New York by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987), further supports this distinction. There, the Second Circuit found that a state lacks standing to sue in federal court for RICO damages "[w]here the complaint only seeks to recover money damages for injuries suffered by individuals." The fact that the underlying conduct "caused substantial injury to the integrity of the state's marketplace and the economic well-being of all its citizens" did not provide federal standing because "the monetary relief sought by the complaint is not designed to compensate the state for those damages." *Id.* at 1017-18. *See also People of New York by Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 71 (2d Cir. 1996) ("New

the United States District Court for Southern District of New York previously has evaluated a Martin Act claim brought by the Attorney General and determined that, when the purpose of the suit is to benefit private parties, the intended beneficiaries are the true parties in interest. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149, 156-58 (S.D.N.Y. 1970).

The Fifth Circuit has applied a similar analysis under the Class Action Fairness Act, observing that "[n]ot everything a State does is based on its 'sovereign character.'" *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). Thus when "a State … attempt[s] to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest," it does not act in its capacity as sovereign; "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement." *Id*. at 426 (quoting *Alfred L. Snapp*, 458 U.S. at 602). In short, according to the Fifth Circuit, when a state seeks to obtain damages for a discrete set of residents—such as by "seeking to recover damages suffered by *individual policyholders*"—the state is bringing

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York's standing does not extend to the vindication of the private interests of third parties.").

what must be treated as a private suit. *Id*. at 429.[5] *See also Hood v. F. Hoffman-La Roche, Ltd.*, 639 F. Supp. 2d 25, 32 (D.D.C. 2009) (because "any compensatory damages sought" in the action would be for the benefit of private citizens, "at least with respect to compensatory damages, the 'persons' who suffered injuries are the real parties in interest for such claims, not the Mississippi Attorney General, regardless of whether the Mississippi Attorney General is acting in a representative capacity on behalf of its citizens").

The cases offered by the NYAG do not support a different approach. In *Missouri v. Stifel, Nicolaus & Co.*, 648 F. Supp. 2d 1095, 1096-97 (E.D. Mo. 2009), the parties did not challenge—and thus the court did not consider—whether the suit there fell within SLUSA. And in *Lander v. Hartford Life & Annuity Insurance Co.*, 251 F.3d 101 (2d Cir. 2001) (NYAG Br. 78), the court likewise had no occasion to consider the question presented here.

Federal law thus makes clear that a claim filed in the name of a state may nonetheless qualify as one brought by "private party" within the meaning of a federal statute, depending upon the nature of the relief sought. When the relief is private in nature, rather than sovereign, the private beneficiaries are the real parties in

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[5] The NYAG seeks to distance this case from *Caldwell*, contending that *Caldwell* "is an outlier that has been emphatically rejected by other circuits." NYAG Br. 100. Although there is some disagreement as to another aspect of *Caldwell*, which we discuss in note 6 below, *this* portion of *Caldwell* is accepted across the circuits.

interest, and the claim must be treated as one brought by them. Under that analysis, which applies here, SLUSA applies to this action.

The NYAG contends that—in addition to the world-wide damages claim—there are other viable claims for relief in this action, such as claims for injunctive relief or disgorgement. NYAG Br. 56-57. But this point is both wrong and irrelevant.

It is wrong because there is no viable claim for injunctive relief or disgorgement in this action. As Defendants-Appellants have explained (Reply 12-18), the SEC has issued injunctive relief *broader* than what the NYAG sought in its initial Complaint. There is thus no injunctive remedy left for the NYAG to obtain. Nor is disgorgement possible in this context, as the Defendants did not sell AIG stock during the relevant period. And the NYAG cannot show that the compensation of the Defendants was tied in any way to the AIG stock performance or the specific transactions in question. For these reasons, there is no viable claim for relief here other than the claim for world-wide class damages.

Even if there were a valid claim for another form of relief, however, that fact would not be relevant to the application of SLUSA preclusion to the damages claim—the part of the lawsuit that is plainly barred by federal law. It is well settled that federal law may apply to preempt or preclude only a portion of a lawsuit; these doctrines are not all-or-nothing propositions. Indeed, SLUSA routinely applies to

some parts of a complaint but not others. *See*, *e.g.*, *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 2013 WL 11884, at *6 (9th Cir. 2013) (concluding that portion of lawsuit is barred by SLUSA); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226-27 (9th Cir. 2009) ("SLUSA does not require the dismissal of non-precluded claims along with precluded claims."); *In re Lord Abbott Mut. Funds Fee Litig.*, 553 F.3d 248, 254 (3d Cir. 2009). Here, whether or not the NYAG presses *sovereign* claims in its own name that are not precluded by SLUSA is entirely irrelevant to whether federal law bars the *damages* claim.[6]

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[6] As the NYAG explains (NYAG Br. 100-01), there is some disagreement in the context of CAFA's removal standard whether suits brought by an attorney general in a *parens patriae* capacity should be analyzed under the "whole-case approach"—which looks to whether the state asserts *any* sovereign claim—as opposed to the "claim-by-claim approach"—which considers the suit in discrete chunks. *Compare Caldwell*, 536 F.3d at 430 (claim-by-claim), *with AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 393 (4th Cir. 2012) (whole case); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 666 (9th Cir. 2012) (same); *LG Display Co. v. Madigan*, 665 F.3d 768, 770 (7th Cir. 2011) (same). The Second Circuit recently noted this point without deciding it. *See Purdue Pharma L.P.*, 2013 WL 85918, at *7-8. The NYAG does not contend, however, that this issue has any bearing on how preclusion operates. And there is no reason it would—as we have shown, SLUSA preclusion *always* applies on a claim-by-claim basis.

To the extent that this disagreement among the circuits, which has arisen with respect to the interpretation of a different statute and in the different context of removal, has any bearing here, the approach of the Fifth Circuit is the better one. As that court explained, it is appropriate "to pierce the pleadings and look at the real nature of a state's claim so as to prevent jurisdictional gamesmanship." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012). Just as state attorney generals are properly barred from gamesmanship in manipulating jurisdiction, the same must be true with respect to federal preclusion.

In sum, the NYAG is seeking an award of damages for a world-wide class of private parties. That claim, accordingly, is not an exercise of the State's sovereign authority; instead, it is an effort to benefit a discrete class of private citizens—those who purchased or sold AIG stock. In these circumstances, federal law requires that the claim be treated in accord with federal rules relating to private-party suits. It accordingly qualifies as one by a "private party," triggering SLUSA. That federal law compels this result is of little surprise: it is settled that, with respect to federal claims in federal courts, "[t]he state cannot merely litigate as a volunteer the personal claims of its competent citizens." *People of New York by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987).

3. The savings clause for state enforcement actions does not apply.

For similar reasons, this action does not come within SLUSA's saving clause that preserves the ability of a state "to investigate and bring enforcement actions." 15 U.S.C. § 78bb(f)(4). Because the world-wide damages claim asserted in this action is classified by federal law as a claim seeking private relief on behalf of the real parties in interest (*i.e.*, the private individuals who would receive an award of damages), that claim does not qualify as an "enforcement action" contemplated by SLUSA.

The term-of-art "enforcement action" has a specific meaning in the context of securities law: It means an action brought by a sovereign in its *sovereign* capaci-

ty. Thus to qualify as an "enforcement action," a claim by an attorney general must assert uniquely sovereign interests—*i.e.*, remedies not available to private litigants, such as injunctive relief (*e.g.*, 15 U.S.C. § 77h-1) or civil penalties or fines (*e.g.*, 15 U.S.C. § 78u-1).

The term has long held this specialized definition. The Securities Exchange Act itself, for example, distinguishes between "enforcement actions" and "private actions"—that is, Section 21(g) "bars the 'consolidation and coordination' of an enforcement action brought by the SEC with a private action." *SEC v. Prudential Sec., Inc.*, 171 F.R.D. 1, 3 (D.D.C. 1997). The Act expressly provides that "no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission." 15 U.S.C. § 78u(g).

In establishing this prohibition against consolidation of private and enforcement actions, Congress understood that enforcement claims were distinct from private claims not because of the nature of the state as plaintiff, but because enforcement claims entail equitable remedies whereas private claims do not. The Senate Report bears this out, noting that a government "suit for injunctive relief brought pursuant to express statutory authority and a private action for damages" are "real-

ly very different" because, whereas "[p]rivate actions for damages seek to adjudicate a private controversy between citizens" (as in this case), a government "action for civil injunction is a vital part of the Congressionally mandated scheme of law enforcement in the securities area." S. Rep. No. 94-75, at 76 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 254.

Substantial case law also confirms this understanding. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), for example, the Supreme Court characterized suits by the SEC involving recoveries of civil penalties as "enforcement actions." *Id*. at 166. And in *Aaron v. SEC*, 446 U.S. 680 (1980), the Court described an SEC suit seeking an injunction as an "enforcement action." *Id*. at 682; *see also*, *e.g.*, *SEC v. First Fin. Group*, 645 F.2d 429, 432 (5th Cir. Unit A 1981) (describing an SEC suit seeking injunctive relief as an "enforcement action").

In drafting SLUSA, Congress was well aware of the specialized meaning of the term "enforcement action" in securities parlance, and its use of the term in the savings clause was no mistake. Of course, if Congress had intended to permit *all* state actions, it could have drafted SLUSA to say so; it could have provided, for example, that the statute's preclusion provision does not apply to any state's efforts "to investigate and bring *actions*." But that is not how Congress drafted the savings clause. Instead, it provided that only those efforts "to investigate and bring *en-*

forcement actions" are exempted from SLUSA's preclusive force. 15 U.S.C. § 78bb(f)(4) (emphasis added). In this way, the State's interpretation of the statute would render the word "enforcement" surplusage, in plain contravention of "one of the most basic interpretive canons that a statute should be construed … so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation and alterations omitted). The limited reach of SLUSA's enforcement action carve-out thus is clear.

When, pursuant to the Martin Act, the Attorney General seeks injunctive relief or civil fines, the State acts in an enforcement capacity. In such circumstances, the enforcement exception to SLUSA applies. But when the State pursues a private claim, that claim does not qualify as an "enforcement action" within the meaning of SLUSA; instead, the claim is treated as a private one for purposes of federal law. That is to say, the defining characteristic of an "enforcement action" is not that it is brought by a sovereign, but that the state asserts an interest uniquely possessed by the sovereign. That plainly does not describe *this* lawsuit, which is no more than a private suit cloaked in the guise of state action. The action therefore is expressly precluded by SLUSA.

4. *Preclusion of this action is entirely consistent with SLUSA's purposes and leads to sensible results.*

Far from leading to "absurd results" (NYAG Br. 81-82), holding this action precluded under SLUSA accords perfectly with the statute's purpose—to ensure

that litigants cannot achieve an end-run around the limits of the PSLRA. Indeed, Congress already had experience in addressing problems caused by diverse state regulatory standards in the securities context. Between enacting the PSLRA in 1995 and SLUSA in 1998, Congress adopted NSMIA in 1996. Pub. L. No. 104-290, 110 Stat. 3416. "The primary purpose of the NSMIA was to preempt state 'Blue Sky' laws" (*Lander*, 251 F.3d at 108), in order to "promote efficiency, competition, and capital formation in the capital markets," and to "further advance the development of national securities markets * * * by, as a general rule, designating the Federal government as the exclusive regulator of national offerings of securities." H.R. Rep. No. 104-622, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3877, 3878. After having concluded that the need for national uniformity should bar states from imposing heightened registration requirements on security issuers, and recognizing the problem of shifting legal bases for asserting class damages claims, it is sensible that, in passing SLUSA, Congress sought to bar states from bringing *de facto* class actions against those same issuers on the basis of state law.

Moreover, the NYAG is wrong in asserting (Br. 81) that this interpretation of SLUSA means that actions formally brought in the name of the state (but whose benefits flow to private parties) are subject to greater restrictions than actions formally brought by private parties. The standards are the same. For example, SLUSA

would not bar an action by the NYAG that did not seek damages for more than 50 parties, just as it permits such an action in the name of private parties.

B. Federal Law Impliedly Precludes This Lawsuit.

Even if the present lawsuit were not expressly precluded by SLUSA, the action still would be precluded by implication. That is so because "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). And it is well settled that the presence of "an express preemption provision" in a federal statute does not "'bar the ordinary working of conflict pre-emption principles'" with respect to that statute. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (alteration omitted) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)); *see also Island Park*, 559 F.3d at 101 ("[T]he presence of an express pre-emption clause in a federal statute 'does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains.'") (quoting *Altria Group*, 555 U.S. at 76). Here, those principles require dismissing the suit. Tellingly, the court below failed to even *consider* the applicability of implied preclusion in this context.

When the enforcement of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the "state law is nullified" under the implied preclusion doctrine. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quotation omitted). In applying this doctrine, "the purpose of Congress is the ultimate touchstone." *Caprotti v. Town of Woodstock*, 94 N.Y.2d 73, 82 (1999) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996)). "To discern the existence and the scope of any congressional intention to preempt State law," courts must consult the "statutory language, … the legislative framework, [and] the structure and purpose of the statute as a whole." *Id*. Here, each of these considerations plainly indicates that, in passing the PSLRA and SLUSA, Congress intended to create a single, federal scheme to govern class action suits claiming fraud related to nationally-traded securities. Just as plainly, permitting the NYAG to bring claims under the Martin Act and Executive Law seeking to recover damages on behalf of a massive class of private shareholders would contradict this purpose.

1. *Congress's clear purpose in enacting the PSLRA and SLUSA was to create a uniform federal scheme to govern the recovery of private damages for securities fraud.*

"The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, 547 U.S. at 78. For that reason, and recognizing the special "danger of vex-

atiousness" that attends litigation under the federal securities laws, Congress enacted the PSLRA in 1995 to combat the "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Id.* at 80-81. "While acknowledging that private securities litigation was 'an indispensable tool with which defrauded investors can recover their losses,'" Congress determined that permissive rules governing securities litigation were "being used to injure 'the entire U.S. economy.'" *Id*. at 81 (quoting H.R. Conf. Rep. No. 104-369, p. 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31). As part of Congress's effort to rein in such "rampant" litigation "abuses," the PSLRA therefore imposed, among other measures, "heightened pleading requirements" and scienter and reliance standards to govern all federal securities litigation cases. *Id*. at 81-82.

But the PSLRA "had an unintended consequence." *Dabit*, 547 U.S. at 82. By imposing more stringent federal standards, it "prompted" litigants "to avoid the federal forum altogether" and bring suits covered by the federal securities laws "under state law" instead, "often in state court." *Id*. To close off this end-run around the PSLRA and "prevent certain State private securities" actions "from being used to frustrate the objectives of the [Act], Congress enacted SLUSA." *Id*. (quotation and citation omitted) (quoting SLUSA § 2(5), 112 Stat. 3227).

As we have discussed, SLUSA provides, for its part, that no "class action based upon the statutory or common law of any State" alleging that the defendant

"used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security" may "be maintained in any State or Federal court." 15 U.S.C. § 78bb(f)(1). Instead, such actions must be brought under the federal standards of the PSLRA.

Against this backdrop, there is little room for doubt concerning Congress's central purpose in enacting the PSLRA and SLUSA: Through the former, Congress meant to impose heightened standards for pleading and proving fraud under the securities laws; and through the latter, to ensure that the PSLRA provided a single, uniform set of "'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, 547 U.S. at 82, 87 (quoting SLUSA § 2(5), 112 Stat. 3227). As the Second Circuit put it, taking these two statutes "in concert," it is clear that "Congress intended to provide national, uniform standards for … litigation concerning" "nationally marketed securities." *Lander*, 251 F.3d at 111.

2. This suit conflicts with the uniform federal policy requiring proof of scienter for class recovery of private damages.

Permitting the NYAG, on behalf of a massive class of private citizens, to bring securities fraud claims to recover money damages under the Martin Act—claims that indisputably would be precluded if brought directly by a class of private citizens themselves—runs directly counter to the PSLRA and SLUSA's clear purpose of creating a single, federal standard to govern such suits. The federal in-

terests are particularly acute here, insofar as this action will impose liability for the payment of damages to private parties without proof of scienter.

A fundamental innovation of the PSLRA and SLUSA, taken together, is the requirement that issuers of nationally-traded securities may be held liable to a class of shareholders for private damages *only* upon sufficient allegations and proof of scienter. "Exacting pleading requirements are among the control measures Congress included in the PSLRA." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Private individuals seeking damages, therefore, must first plead with particularity and then prove "facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention to deceive, manipulate, or defraud." *Id*. (quotation omitted). Absent proof of scienter, a class of private individuals may not recover damages for securities fraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). SLUSA, in turn, precludes a class of private parties from obtaining a damages award in state court based on any lesser standard of liability.

The Attorney General's action conflicts with this explicit federal policy. The trial court expressly concluded that the NYAG was not required to prove scienter to establish liability for private damages in this action. "Under both the Martin Act and the Executive Law § 62," the court explained, the Attorney General "is not required to demonstrate scienter in order to sustain civil liability for a violation." Slip

op. at 26 (R. 35). And in its briefing below, the Attorney General out-rightly admitted that the purpose of this suit is "to recover damages" on behalf of investors without concern for satisfying the requirements of "class actions brought under different statutes" such as the PSLRA, "imposing higher standards of proof." R. 14870. Indeed, in its briefing here, the NYAG contends that New York does "not impose a scienter requirement for civil securities fraud claims, whether in private lawsuits or public enforcement actions." NYAG Br. 95. There is thus no doubt that, in this case, the NYAG seeks relief for a class of private individuals using a legal standard different—and more plaintiff friendly—than that selected by federal law. Should the NYAG prevail in this suit, the conflict with federal law could not be more stark, as the Attorney General would recover for a class of private individuals using legal standards that Congress has expressly rejected. This suit, accordingly, cannot be squared with the "national, uniform standards" Congress has established under the PSLRA and SLUSA. *Lander*, 251 F.3d at 111.[7]

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[7] Curiously, the NYAG points to provisions of federal securities law that it contends do not require a finding of scienter. NYAG Br. 95-97 & n.47. But that is a non-answer for at least two reasons. For one, those provisions have no apparent relevance to the federal claims being pursued in the parallel federal class action. *See* Consol. Second Am. Compl., *In re Am. Int'l Group Secs. Litig.*, No. 04-cv-8141 (S.D.N.Y. Sept. 27, 2005) (Dkt. No. 132). Tellingly, the NYAG does not suggest that the federal-class-action Plaintiffs could recover without demonstrating scienter. Additionally, the NYAG's position is irrelevant because the federal law that *does* require scienter, Section 10(b) of the Securities Exchange Act of 1934, is the broad "catchall" provision, whereas the other statutes the NYAG cites "apply more narrowly." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359-60 (2d

This Court has not hesitated in the past to declare that the Attorney General may not invoke its special litigation authority to bring claims on behalf of private individuals "as an attempt to circumvent the fault-based claims" that private citizens suing in their own rights would have to bring. *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 69 (N.Y. 2008). That is even more clearly so with respect to the PSLRA and SLUSA, given Congress's clear and settled purpose of creating a single, federal scheme to govern lawsuits like this one. It is precisely the point that those federal laws prevent a single state, like New York, from "impos[ing] the risks and costs of its peculiar litigation system on all national issuers." S. Rep. No. 105-182, 1998 WL 226714, at *5 (1998). If permitted to stand, this action would frustrate the federal policy that conditions private damages for security fraud on proof of scienter. This Court accordingly should hold the Attorney General's claims implicitly precluded.

In focusing on NSMIA, the NYAG contends that States may pursue *enforcement* actions, and that nothing suggests that the savings clauses were somehow neutered by implied preclusion. NYAG Br. 92-95. We do not disagree on this point. The critical distinction with which the NYAG fails to wrestle, however, is

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Cir. 2010). The Martin Act and the Executive Law that the NYAG seeks to enforce absent a scienter requirement are precisely the same sort of "catchall" as Section 10(b). Thus the maintenance of this suit is necessarily in conflict with the limitations on federal class actions.

that *this* claim is not one that may be deemed *enforcement*; instead it must be treated as indistinguishable from a private class action. And it is *that* kind of claim that is both expressly and impliedly barred by federal law.

CONCLUSION

The order of the court below denying summary judgment to the Defendants should be reversed and remanded with instructions to dismiss the action as precluded by federal law.

Respectfully submitted,

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